86-788

No._____

Supreme Court, U.S.
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In the Supreme Court of the United States

October TERM, 1986

ALABAMA POWER COMPANY,
a corporation.

Respondent

v.

1354.02 ACRES, MORE OR LESS,
OF LAND IN RANDOLPH COUNTY,
ALABAMA, and Gladys Graves, et al.
Robert A. Perry

Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES 11th
CIRCUIT COURT OF APPEALS

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Does due process clause of the V and XIV Amendment of U.S. Constitution require that the Court of Appeals address all issues presented for review? Does due process clause require a lower court to abide by and enforce the ruling of the higher court? Does just compensation clause of V Amendment, upon condemning of property, require that property owner be paid for damages, property and all rights taken? Is the due process clause violated, after a ruling in the Court of Appeals, and when the lower Court refuses or fails to comply with that ruling, and when a second Appeals Court on the same level as the first Appeals Court changes the ruling of the first Appeals Court? In eminent domain proceeding is due process including proper instruction and just compensation a requirement of the U.S. Constitution or a requirement of 16 USC 814,or a requirement of U.S. v. Merz?

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The Eleventh Circuit Court of appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same issue, had rendered an opinion in conflict with Alabama Supreme Court, has upheld an opinion and judgement of District Court which reverses another Eleventh Circuit Court of Appeals decision on the same matter, has refused to review the issues on appeal, has made an opinion which marks a departure from reasoned analysis. It announces a rule which fails to protect the values protected by the 5th and 14th amendments of the United States Constitution, it sanctions the improper actions of District Court on the issues of instruction to commission in confilict with U.S. Supreme Court. Appeals Court never examined the possibility of prejudice which the errors complained of might have affected thereby establishing clearly erroneous conclusions.

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PETITION FOR WRIT OF CERTIORARI

Robert A. Perry respectfully prays that this Court issue, a Writ of certiorari to review the judgment and opinion entered by the 11th Circuit Court of Appeals in Alabama Power Company v. 1354.02 acres, more or less, of land in Randolph County, Alabama and Gladys Graves, et al. Defendant, Robert A. Perry No. 85 - 7146 (May 30, 1986).

OPINIONS BELOW

The opinions of the 11th Circuit Court of Appeals affirming in part, reversing in part and remanding this case is reported at 709, F2d 666, dated July 11, 1983 and is in the appendix The judgment and opinion of District Court, dated January 15, 1985, granting no relief as required by reversal, Civil Action No. 78-213-E is included in appendix The opinion of the 11th Circuit Court of Appeals affirming the action of District Court and commission on remand is Case No. 85-7146,dated May 30, 1986 and is not published but is included in appendix

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 and the V and XIV Amendments of The U.S.Constitution. Property was condemned under eminent domain as authorized by Federal Power Act Sec 21, 41 Stat. 1074, 16 USCA § 814. The opinion of the 11th Circuit Court of Appeals was entered May 30, 1986. It denied a timely petition for rehearing and suggestion for hearing en banc July 29, 1986. This petition for writ of certiorari was filed within

the 90 day period as prescribed by Rule 20 as time is computed by Rule 28 and Rule 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The resolution of the question presented in this case involves the due process clause of the V and XIV Amendment and the just compensation clause of the V Amendment of the United States Constitution.

United States Constitution, Amendment V provides in pertinent part: ---nor shall any person--- be deprived of life, liberty, or property without due process of law: nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV provides in pertinent part: section 1---Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

A. Summary of Facts

Robert A. Perry owned a 188 acre cattle farm until Alabama Power condemned in 1978 and took 15,71 acres of it along with the entire riparian rights, the entire southern edge, and part of the eastern and western edge of this property containing a strip about 15,000 feet long consisting of fences, raw land, riparian rights, minerals, timber, access roads to the main body of land and access roads to a section of the property that was severed by water in the after condition. Property was completely fenced and used continually for pasture until Alabama Power Company destroyed the fences in 1979.

Part of the boundary of property was joined by Alabama Power. Boundary line was the 790 foot elevation contour. On part of the southern boundary Alabama Power did not own to the 790 foot contour. Along this southeastern section of the property, the center of Wedowee Creek was the property line for about 1500 feet. Alabama Power Company had purchased to the 790 foot contour in 1928. In its deed from Bunt Hood to Alabama Power Company, (1928), Mr. Hood gave an erroneous description of lands now owned by Perry when he sold the property below the 790 foot contour to Alabama Power. This deed was in error because Mr. Hood never owned all the property deeded to Alabama Power . The section not owned but erroneously deeded to Alabama Power is the 1500 feet of property owned by Perry that was bordered by the canter line of Wedowee Creek.

In about 1942, Alabama Power marked the 790 foot contour line along the line between Perry and Alabama Power. They did not stop the marked line at the end of their actual owned land but continued with the line to include all land in the erroneous deed from Bunt Hood. They maintained that line by keeping it painted. At that time, Perry pointed out the error to Alabama Power and assumed the error would be corrected after an exchange of letters. Perry had fenced the property, was using and continued using it. Even though Alabama Power did not own to the 790 foot contour along all this property there now exists a blazed and marked red line on the 790 foot contour along the Perry, Alabama Power land line but also across Perry land on which section Perry owns above and below the marked 790 foot contour line. Said line

does not denote a land line as believed by Alabama Power but simply marks the 790 foot contour across Perry's land. During the time of appraisal by Alabama Power it came to the attention of Perry that Alabama Power was using erroneous maps, assuming the marked 790 foot contour to be the correct line between Perry and Alabama Power. Perry attempted to get these maps corrected. Alabama Power responded that their maps were correct and enclosed their erroneous deed from Bunt Hood to the property along with a written statement (DX5A, June 15, 1978) showing that they had appraised and cruised only 9.76 acres of land. The correct acreage taken is 15.71 acres of land and timber. Maps were finally corrected on August 10,1978 but this was after Alabama Power had made its one and only cruise and appraisal of property. During the 1981 commission hearing, the Commission and District Court refused to allow testimony of erroneous maps. Alabama Power Appraiser stated before Commission the times he was on the property and appraised the property to be Sept. 1976. Mr. White testified that he made only one cruise of the timber and that was in July 1978. He stated he cruised 9.6 acres, used maps from Alabama Power. All testimony confirmed the use of the incorrect maps, which would not have included the fences, one road, part of the timber, minerals, part of the land and the riparian rights. Alabama Power appraiser also falsified the length and cost of replacement road that he appraised. He stated it to be 1200 feet long. He established his price with replacement cost. He also stated repeatedly that he allowed nothing for taking the riparian rights. (Tr191-192-193-194), stated that

he did not appraise minerals. Alabama Power established its raw land price by the use of low grade pure timber land comparable sales in spite of their stated highest and best use to be pasture. The comparable sales were not comparable to condemned land. The instruction to Commission included no instruction on how to appraise in the absence of sales comparables in every way; none at all on the means of appraising minerals, best evidence of value, burden of proof; the words RIPARIAN RIGHTS are not mentioned.

Commission and District Court accepted Alabama Power appraisal,even though it was admitted to be a partial appraisal and in spite of clear instruction that property must be valued as a whole and appraisal is required before condemnation. Commission totally ignored Perry's proper appraisal. District Court failed to properly instruct and falsified reasons for not paying for minerals. District Judge made a false statement by attributing statements to a Power Company mineral expert. He also falsified a statement of land value attributed to Perry when he stated that Perry land value was $10,000.00. On appeal to the 11th Circuit Court of Appeals (1982), Perry pointed out the failure of District Court to allow map correctness testimony. Perry showed the erroneous maps used by Alabama Power and the relation of the map used by Alabama Power appraiser and the actual date of appraisal by this appraiser. The same applies to the cruising or appraising of timber. The Court of Appeals agreed with Perry and rejected Alabama Power's argument. The Appeals Court found that District Courts failure to allow Perry an opportunity to prove his point on the issue of maps used and

land left off maps was a "clear error of law". This same error will be repeated by District Court in 1984 and affirmed by appeals court in 1986 after appeal.

The Court of Appeals reduced this issue of appraisal to one fact in its remand: Land owner must be allowed to prove his point. District Court refused to allow the reversal and remand from the 11th Circuit to be used by Commission on remand. District Court's instruction did not state findings and remedy as prescribed by 11th Circuit. Perry attempted three times to get District Court to properly instruct. Perry objected and complained that this part of the reversal consisted of two issues. The correctness of maps on the separate dates and separate action of both the appraiser of land and cruiser of timber. The specific issue stated by 11th Circuit to be all important was never shown to or instructed to Commission. These were the issues on appraisal on remand that should be determined but were not because of instruction. Were the maps correct at the date of timber cruise? If not the timber cruise was wrong. Were maps correct on date of land appraisal? If not the appraisal was wrong. Was there additional land left off maps after August 1978 correction of maps? There was also the riparian rights issue which was addressed by reversal (1983). Reversal states District Court was in error for assuming that riparian rights were included in total value found by commission because the witness whose testimony was generally accepted by Commission had not discussed or disclosed the value of riparian rights. Appeals Court asked for the disclosure and payment for this specific value of riparian rights that was not included in Alabama

Power testimony of total value as accepted by Commission. Instruction never states this and Perry objected and requested proper instruction three times to no avail.

In the interval between reversal and second Commission hearing, while Perry was attempting to no avail to get proper instruction, District Court asked Perry, in show cause, for values of riparian rights, and timber left off maps, before correction and value of so called pressed down land left off maps, after correction.

On hearing of remand before Commission, which is held with improper and objected to instruction, Commission limits already erroneous instruction even more when they limit appraisal issue to be a timber appraisal issue only (3 Tr 5) at which time Perry objected. There was never any doubt that Alabama Power stated that they appraised 15.71 acres but the court of Appeals (1983) has made the issue to be not what Alabama Power said it appraised but what it actually appraised based on when appraisal took place,was the map correct on that date? If not Appeals Court finds that appraisal was wrong, irrespective of what Alabama Power says it appraised.

On riparian issue Commission states its predetermined finding and reason for not paying for riparian rights. That false statement follows:

> Mr. Chairman : "and with respect to Item number one, we are of the opinion that we had considered riparian rights in estimating the value of land. However our opinion was based on the fact that Mr. Moss had testified to the value and gave consideration to the riparian rights value at that time. Now we would like to reinforce our consideration of that by having Mr. Moss re-testify if he gave any value or any special value, exceptional value or

any value included in his testimony for riparian rights." (3 Tr 13).

Perry objected and showed Commission that Moss stated he allowed nothing for riparian rights. (3 Tr 15-16). Perry objected to instruction (3 Tr 15-16). Perry objected to instruction (3 Tr 18). Moss states that he included value of riparian rights in appraisal, Perry objected because Moss's previous testimony stated that he allowed nothing for riparian rights (3 Tr 23-24-25-26). Numerous objections followed the contradictory testimony of Moss, saying he included riparian rights in value at 1981 hearing,based on the whole and total testimony to the contrary at the earlier Commission hearing (1981). Moss's testimony that he allowed nothing for riparian rights was given at the same time of his testimony of total value which was accepted by Commission. (3 Tr 31-32-33). Commission at this point ruled that Moss had included riparian value in values at 1981 Commission hearing. Perry strenuously objected, showing testimony totally to the contrary (3 Tr 40-41-42-43-44), and showed Moss's testimony to be pure contradiction. Appealed but affirmed.

On Issue number two, Perry proved that he owned so called pressed down land by deed, survey and by possession. Alabama Power owned next to it but never exercised any ownership over the property, Perry harvested timber on it but Alabama Power stopped at the line of property at any time it made timber sale. (3 Tr 46, 3 Tr 143). Perry proved value by method prescribed by Court of Appeals (1983) to be (3 Tr 127-130 through135). Perry showed that Alabama Power artificially lowered the isthmus so that now the land is

surrounded by the 790 ft. contour but this was not true in 1976. Commission found that Perry never owned. It was appealed to Court of Appeals (1986),it refused to address issue.

On Issue number Three "Appraisal of less acreage than actually at issue", which was interpreted by District Court and Commission to be a timber appraisal issue only. This instruction is wrong and objected to. Commission contended they are not bound by reversal but by Judge Varner. (3 Tr 155-156). A large number of pages were wasted to try to show that the Court of Appeals had said that both land appraisal and timber appraisal or cruise was at issue. Each time as the actual words and logic of the reversal would prevail, then Alabama Power and Commission would state that only Judge Varner's instruction meant anything and the reversal was meaningless to them. They never would admit that appraisal was larger that simply stating we paid $300.00 per acre for 15.71 acres and that appraisal involves land together with fences, access roads, highest and best use as well as does the highest and best use actually change when the property is considered in its entirety. Perry showed Commission that Moss, the appraiser and White, the cruiser only appraised 9.76 acres as was the amount on (DX 5A) (3 TR 186), a written offer from Alabama Power dated June 15, 1978. Alabama Power stipulates that maps were in error until correction date August 1978. Moss appraised in September 1976 (3 Tr 163-168). Area not appraised had $16,000.00 worth of fences on it (3 Tr 179). Perry showed John White cruised 9.6 acres by referring to (3 Tr 176) (Tr 174). Acreage

corrected just before condemnation but not re appraised. (3 Tr 183-184). Improvements are not considered (3 Tr 184). Change dates on maps to verify map corrections shown. (3 Tr 191-192). Amount of timber per acre on land left off maps shown (3 Tr 127, 130 through135). Alabama Power testified in direct contradiction to previous testimony that they knew about map changes before White cruised. And that because the condemnation stated 15.71 acres taken that means it was appraised.

All this falsifying and all this effort was wasted because the District Court refused to instruct according to the reversal.

On re-hearing before District Judge, which was only partially recorded, he affirms that Commission included value or riparian rights, evan though all testimony at first hearing was to the contrary, as was the finding of the reversal. He had refused to instruct according to the reversal. He restated his position that land appraisal was not in reversal and made no finding. He reversed the majority of Commission when they awarded extra compensation for timber. He did not discuss or analyse the testimony in light of proper instruction.

He took timber because his Commission had made an error. Not that Perry failed to prove every thing and more as required by reversal.

On appeal back to 11th Circuit, that Court did not address the important issue of instruction, bias of Commission and District Judge, issue of eroded or pressed down land and the issue of land not appraised because the maps used by appraiser was incorrect until August 1978, that was clearly reversed and remanded but never addressed by District Court.

The 11th Circuit.1986, did not address riparian issue in light of proper instruction, previous appeals finding and reversal and in so stating that the value specifically asked for by pervious court was not necessary to disclose, thus reverses a previous Court on the same issue. The Appeals Court did not review timber issue in light of finding of previous reversal, evidence from 1981 Commission hearing, and proper instruction to Commission on remand.

B. PROCEDURAL HISTORY: Raising and Preserving of Question.

November 14, 1978, Alabama Power condemned under eminent domain as authorized by Federal Power Act. Sec 21, 41 Stat. 1074, 16 USCA S 814. Perry answered complaint 12-11-78 and gave 28 reasons why "Just compensation" was not paid. Asked for a Jury Trial 3-1-80. District Judge never denied but referred to Commission without instructing according to Issues raised in "answer", Commission report made 1-13-82, Perry petitioned for review with exceptions to Commission report and demanded Jury Trial 1-29-82, granted hearing 8-12-82, denied rehearing 10-1-82, Perry appealed to 11th Circuit Court of Appeals 11-3-82 based on not just compensation, which upheld in part, reversed in part and remanded 7-11-83. Perry's Brief of Errors, Biased Rulings and statements by Commission and Honorable Judge along with instruction not followed and additional instructions needed (not acknowledged) 12-1-83. Perry objection to court Letter of 12-12-83 and request for supplementary instruction and enlargement of issues to be considered. (not acknowledged 1-3-84). Order of show cause

asking Perry for value of riparian rights in footage and value per foot, value of timber not appraised and value of pressed down land 1-13-84. Order stated 1-26-84--Order correcting typographical error 3-9-84--Order to answer Show Cause 3-20-84. Perry's answer to Show Cause 4-6-84 showing just compensation. Order of Remand to Commission 4-18-84. Perry motion to set aside or amend order, order of remand and denial of motion for new Judge and Commission 4-30-84, denied 4-30-84. Perry motion to file interlocutory appeal to get proper instruction 5-9-84. Order denied 5-14-84 Report of Commission 8-26-84. Perry objections to Commission Report and petition for Review objecting to instruction and compensation 10-15-84. Hearing before Judge 1-2-85. Motion for rehearing 1-20-85. Denied 1-30-85. Perry reappealed to 11th Circuit Court of Appeals 2-14-85. Appeals Court affirms 5-30-86. A timely appeal for a rehearing and en banc consideration was filed. Denied 7-29-86.

This appeal was primarily an action to force District Court to abide by 7-11-83 reversal and remand by the 11th Circuit Court of appeals directing that Perry be paid just compensation for property and rights taken. District Court has failed to properly instruct. Instruction can be used as a tool to deny just compensation, just as it can be used to guarantee just compensation. District court has a long history, in this case, for using instruction in a biased way to in fact deny Perry "Just compensation" and due process as guaranteed in the U.S. Constitution.

Perry at every stage of the proceedings has objected based on just compensation and due process. Instruction by District

Court asks questions that are already findings of fact in the reversal.

REASONS FOR GRANTING WRIT

The Eleventh Circuit Court of appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same issue, has rendered an opinion in conflict with Alabama Supreme Court, has upheld an opinion and judgement of District Court which reverses another Eleventh Circuit Court of appeals decision on the same matter , has refused to review the issues on appeal, has made an opinion which marks a departure from reasoned analysis. It announces a rule which fails to protect the values protected by the 5th and 14th amendments of the United States Constitution, it sanctions the improper actions of District Court on the issues of instruction to commission in conflict with U.S.. Supreme Court. Appeals Court never examined the possibility of prejudice which the errors complained of might have affected thereby establishing clearly erroneous conclusions.

Perry appealed for the second tome to the court of appeals in 1985 attempting to get District court to abide by the 1983 reversal. This appeal consisted of six issues:

STATEMENT OF THE ISSUES

ISSUE I DISTRICT COURT FAILED TO AWARD ANYTHING FOR RIPARIAN RIGHTS.

ISSUE II DISTRICT COURT IS IN ERROR FOR NOT AWARDING ANY PAYMENT FOR SO CALLED PRESSED DOWN LAND.

ISSUE III DISTRICT COURT IS IN ERROR FOR NOT AWARDING PAYMENT FOR TIMBER NOT APPRAISED AND FOR NOT FOLLOWING THE MEANS AND METHOD FOR DETERMINING THIS ISSUE AS OUTLINED BY COURT OF APPEALS

ISSUE IV DISTRICT COURT FAILED TO ALLOW PERRY TO SHOW THAT NOT ALL LAND WAS APPRAISED AND FAILED TO MAKE ANY FINDING ON THIS ISSUE, THEREBY DEPRIVING PERRY OF JUST COMPENSATION.

ISSUE V DISTRICT COURT AND COMMISSION IS BIASED, THEREFORE DENYING PERRY JUST COMPENSATION FOR LAND TAKEN.

ISSUE VI DISTRICT COURT ERRED WHEN IT DID NOT GIVE PROPER INSTRUCTION.

The appeal Court on page one of its May 30,1986 opinion said:

> The appeal in this condemnation suit simply questions whether there is sufficient evidence to support District Court's determination that appellant property owner was adequately compensated for riparian rights and timber on condemned land. we affirm.

Court of Appeals (1986) totally misses the point. Appeal is from District Court's opinion and instruction and Commission's finding and conduct on remand after a reversal from the 1983 Court of Appeals. The 1986 Court of Appeals has not addressed the issues on appeal in the light of facts from the 1981 commission hearing and District Court, the reversal in 1983, the faulty instruction to commission on remand, the issues actually appealed or the fact that power company testimony was tainted at the 1984 commission

hearing according to the same witnesses previous sworn testimony. 1983 appeals court reversed and remanded to District court on four issues, yet District court refused to abide by this reversal, refused to award any compensation, and proceeded to improperly instruct and act in a biased manner to in effect reverse and circumvent the 1983 reversal.

Issue I. riparian rights: Appeals court 1983 found:

(2) District Court erred in assuming that the Commissioners who were appointed to determine compensation took the reparian value into account in assessing the total land value because the property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights (709 F 2d 666).

At 1981 Commission hearing, Moss the appraiser whose testimony was relied on stated that he allowed nothing for reparian rights (Tr 191,192,193,194).

Alabama Power Company v. 13543.02 acres, more or less, of land in Randolph County, Alabama and Gladys Graves, et al. 709 F 2d 666 (1983).

Compensation for Riparian Rights and Damages

Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. Appellee responds that "(t)he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission...and the District Court... found enhancement to the remainder as a result of the reservoir." The Commission mentioned appellant's claim as to riparian rights, but made no finding. The District court assumed the riparian rights "must have been " considered in assessing the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellee's, however, this assumption was error.

Compensation for the taking pursuant to 16 U.S..C. s 814 is a question of federal law, which is resolved here by reference to Alabama law. See Georgia Power Co. V. Sanders, 617 F.2d 1112 (5th Cir.1980) (en banc). The Alabama Code clearly states that except in cases involving condemnation for highways or water conservancy projects, enhancement to the remaining land is not to be considered in determining "just compensation" for the land taken. section 18-1-18, Code of Alabama (1975). That provision has been construed, however, not to preclude consideration of enhancement of the remaining land to offset damage to the remaining land. Town of Eutaw V. Botnick, 150 Ala. 429, 43 S.739 (1907).

[2,3] In other words, there is a distinction made between the land taken and the land remaining. The property owner must receive "just compensation" for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land, however , may be offset by enhancement in the value of that land. Appellant's claims for damages due to interference with watering rights, for example, clearly are damages to remaining property which, under the Town of Eutaw rationale, may be offset by any enhancement. That is not the case, however, with riparian rights. Once the land containing water and access to that water, is condemned the taking is complete. Those rights are akin to condemned real property. enhancement, therefore, may not be set off against riparian rights. As riparian rights fall on the "taking" side of the equation, denial of the rights must be compensated.

Instruction from District Court given to Commission on remand was objected to three times. The issue was not what District judge stated in his opinion, filed January 15,1985.

Instruction I. In assessing the total value of the land taken did you consider the value, if any, of riparian rights?

This instruction misses the point of the reversal. The reversal did not want to know if Commission considered the value (because appeals court had found that it did not) but instead it wanted value of riparian rights disclosed and added

to erroneous total value found by Commission at 1981 hearing. Commission found and District Court agreed in 1984, on remand, after receiving District Court's faulty instruction, that Moss had stated riparian value and included that value in total value (3Tr 13) and thus awarded nothing for rights taken. They never showed this testimony from 1981 hearing or disclosed the value, Perry objected and showed Moss testimony to the contrary. 1984 Commission hearing and Instruction was nothing more than a cover up. The 1983 reversal had clearly found that Moss had never disclosed or included riparian value in his total value accepted by Commission. The issue is not as appeals Court (1986) stated or as District Court(1984) instructed, but is an issue that the value of riparian rights has not been disclosed and paid for as directed by 1983 reversal. Instruction was not proper. Appeals Court 1983 carefully explained its finding of fact after stating that riparian value was not included in Commission and District Courts total value. It stated that Alabama Power stated that it did not pay for riparian rights because it was more than offset by advantages caused by the reservoir. Appeals court responded that this was an erroneous assumption of law because reparian rights fall within the taking, and anything taken can not be offset by enhancement but must be paid for. They stated that Alabama Power had testified before the Federal Power Commission that they expected to pay for riparian rights. The reversal remanded to ensure that the value of these rights are paid for. If this reversal was not soundly based on facts and law Alabama Power could have appealed in 1983. They did not and thus

the reversal's finding of fact and instruction become the basis for future litigation in this case. Facts from reversal are that riparian rights are not included in testimony from Moss, Alabama Power's high ranking employee, appraiser, and the man whose total value was accepted by Commission and District Court. The instruction should have been to now Determine value of reparian rights, disclose that value and add it to erroneous total value found by Commission and District Court in 1981-82. If Commission dared to attempt to reverse appeals court 1983,as it did, it would have had to show that included reparian value came from Perry, because it is fact that Moss did not include value or state it, only Perry did. After the clear finding of appeals Court in reversal,that Moss had not included riparian value in his total value, District Court, states that value came from Moss and is included in commission's total value from 1981. Appeals Court 1986 upholds that finding and states it is not necessary to disclose value of reparian value as required by reversal. We have clearly seen Commission and District Judge reverse the court above by using faulty instruction and another court of appeals affirming District Courts reversal of court above. 1984 Commissions restatement that their total value came from Moss in 1981 is a statement that they offset riparian value with enhancement illegally, because the reversal had found that Moss's total value did not include riparian value because Alabama Power had offset that value with enhancement. In other words logically speaking, Commission accepts Moss's total value, found to not include riparian value because of enhancement offset by 1983 appeals

court. The very fact that Commission accepted its total value from Moss means that their total value also does not include riparian rights by virtue of the fact that Moss's total value did not include riparian value. These are facts and Commission can not say that they did not offset and Moss can not say he did not offset. Time for appealing those facts from 1983 reversal has long since passed. U.S.. V. Merz 84 S. Court. 639 (1964) states that first responsibility of District Court aside from appointment of competent Commissioners, is proper instruction. In this case instruction and the law comes from appeals court 1983 on reversal and remand. Also see 146 Ala. Court. 208,40 So 205 (1906)

Appeals Court 1986 states that it is not necessary to disclose value of reparian rights in this case. That is not true. This is one of those unique cases where by the exception to the unit rule applies.

Another panel of the 11th Circuit Court had reversed because value of riparian rights was not included in total value. They wanted to ensure that specific value is paid for. Moss's reason for having not included riparian value is not as important as his specifically stating he did not pay for reparian rights. He allowed nothing for reparian rights (Tr 191,192,193,194). See City of St. Louis V. Turner 331 Mo. 834, 55 S.W. 2d 942, p 944-945 (1932) see United Stated V. City of New York 165 F 2d 526, 528-529 (2nd Cir. 1948) This is a unique situation in which witness testified under oath that he had not paid for riparian rights and his total value was accepted by Commission. Various components of total value from Moss were established by different methods;

raw land by comparable sales, road by replacement costs, timber by cruise but he stated he allowed nothing for riparian rights. United States V. Corbin 423 F2d 821 (1970) p828.

> In order to comply with Merz supra the value arrived at had to be disclosed. Each component was arrived at by a different approach, therefore the aggregation of the values of the separate components seems to be the most logical manner of stating the ultimate award.

This 1986 appeals court and District Court opinion is in conflict with the 1983 panel from the same circuit on the same issue. Due process and just compensation is denied as guaranteed by United States Constitution. Please read Judge Hatchett's dissent in the 1986 opinion of the 11th Circuit. The dissenting opinion in the Court of Appeals decision states that the Court did not address all issues raised, and states that the case should be remanded once again to the lower court. Appeals Court (1986) completely ignores appealed issue II, issue IV which was not addressed in 1981 or 1984 by District Court and which was termed to be a clear error of law by 1983 appeals court, issue V, and the all important issue VI which dealt with instruction. This failure to address the issues clearly denies due process and just compensation.

District Court and Commission in their reports had failed to explain why they disregarded Moss's testimony at 1981 Commission hearing where he plainly stated he allowed nothing for riparian rights and now in a Conclusionary Statement says that riparian rights value is included in total value which was found by 1983 reversal to contain no riparian value

The Eleventh Circuit Court of Appeals remanded certain issues for proceedings not inconsistent with its decision. The

general issue is whether the proceedings in the lower court after remand were consistent with the Eleventh Circuit decision.

The dissent in the second Eleventh Circuit opinion of May 30, 1986 states that these lower court proceedings were not consistent with the earlier Eleventh Circuit ruling in that they failed to make findings on the issue of the value to be assigned to the riparian rights (p. 6 of opinion).

United States v. Merz, 376 U.S. 192, 11 L Ed 2d 629, 84 S Ct 639 (1964). The Supreme Court held in this case that reports of commissions were an insufficient basis for determining the issue of just compensation where the reports contained conclusory findings, and where the commissioners did not indicate the process or reasoning they used in deciding on a particular award.

U.S. v. 90.39 Acres of Land, 413 F Supp 91 (Dc Iowa 1976). The District Court held in this case that the report of land commissioners should not be accepted by the court where the commissioners failed to explain why they had rejected the Landowner's evidence of the effect the taking would have on business growth.

Appeals Court (1986) by stating the other part of its assumption of issue III to be "a sufficiency of evidence to support adequate compensation for timber", clearly again misses the point. District Court also states that this is a timber appraisal issue only on page 9 of its opinion. It is in error for not instructing according to 1983 reversal. The issues to be determined were: are maps correct at time of land appraisal and timber cruise, if not, added compensation was due Perry.

District Court states that land left off the maps (appeal issue IV) at the time of appraisal was not an issue and fails to make a finding on the issue (1984). Appeals Court 1986 refuses to review the issue on appeal and denies compensation and due process. The following excerpts from reversal address the action as two people doing two things. If this reversal only concerned itself with a timber appraisal, it would address it singularly, Excerpts showing dual action by two people (cruiser and appraiser) doing two things (appraising land and cruising or appraising timber) follows:

> The basis for this allegation is a claimed discrepancy between the actual property and the map utilized by Alabama Power to assess the amount of compensation and guide the cruiser---as to the two issues, concerning acreage (payment for timber and land) the court acknowledges --- the court determines that all the land was appraised "not clearly erroneous". We disagree.--- The timber cruiser and appraiser testified they appraised all the land as indicated on the maps. If the maps were incorrect however, their determination as to the proper amount of compensation would be incorrect as well. --- It was incumbent upon District court to hear his testimony and allow him to prove his point. Upholding determination of the commission as "not clearly erroneous" when they failed to provide appellant an opportunity to prove his point was a clear error of law.---We remand to provide appellant an opportunity to prove that Alabama Power appraised and cruised insufficient acreage and for what ever adjustment are necessary. (709 F 2 d 668-669).

After this discussion in reversal of the appraisal and cruise by the appraiser and cruiser, it is a cruel, unjust, unfair and a rediculous denial of just compensation for District Judge (affirmed by appeals court) to say that this is a timber appraisal issue only. Land was an issue as was timber and the

basis for added compensation was the issue of correctness of maps on the actual date of cruise and appraisal. District Judge is so personally biased because of being reversed by such a lowly person as Perry, that he will go to any means of discrediting that reversal, irregardless of what the law is or instruction should be or what reversal reverses.

Eminent Domain 186, 263

> In eminent domain proceeding, district court erred in upholding commissioners' determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps; cause would be remanded to provide property owner and opportunity to prove that condemnor appraised insufficient acreage. (709 F 2d 667)

No reasonable person can construe this to be referring to a timber appraisal only, as District Court interprets it to be on page 9 of its January 15, 1985 opinion. Its refusal to make a finding on land appraisal or instruct properly on this and other issues is affirmed by1986 appeals court.

Wilson v. United States, 350 F 2d 901 (USCA 10th Cir 1965). This case states that where the instructions given, taken as a whole, are plainly in error a case must be reversed (p.908). The instructions being reviewed must be considered as a whole, not piecemeal or by taking parts of them out of context. The court in this case upheld the instructions given.

United States v. 125.07 Acres of Land, 667 F 2d 243 (USCA 1st Cir 1981) The court stated that the first responsibility of the district court, apart from the selection of responsible commissioners, is the careful instruction of them on the law, and if the Commission is given an erroneous

instruction, or no instruction at all, on a question of law which may have an impact on their determination of fair market value, their decision is tainted in the same manner as a jury verdict returned upon an erroneous instruction. The court vacated the award of compensation in this case because of lack of proper instruction as to the status of a certain road

District Court instruction did not ask for the specific finding of map correctness in its instruction and proceeded to circumvent the all important condition: If the map was wrong in September 1976,the date of appraisal, then Perry is due compensation for value components of land and improvements left off erroneous maps. If maps are wrong in June or July, 1978, the date of timber cruise, Perry is due added compensation for timber left off the maps at time of cruise. Without proper instruction Alabama Power presented tainted testimony at 1984 Commission hearing. They were providing wrong answers to wrong questions (instruction). Perry received nothing for land or timber not appraised because of faulty maps, due to instruction and bias. Alabama Power used erroneous maps showing that they were only taking 9.76 acres during appraisal in September 1976 and timber cruise in July 1978. Maps were corrected in August, 1978 to reflect the correct acreage (15.71) , but no reappraisal of land or cruise of timber was done by Alabama Power after maps were corrected. Appeals Court 1983 found that Alabama Power only appraised and cruised the land and timber that was shown on the erroneous maps in existence at time of appraisal September 1976 and at time of timber cruise in July, 1978.

They wanted District Court to award pay for land with Improvements and timber that was left off those maps until corrected in August, 1978. District Court did not so instruct or find. Appeals Court affirmed. Due Process and just compensation is denied Perry.

It Defies all logic that Alabama Power would survey the property they believed to be taken, draw survey maps and put those maps into the hands of appraiser and timber cruiser and than assume they did not use the maps to appraise the property by. Moss appraised the property in September 1976, the maps were corrected in August 1978 to reflect the correct acreage. Is there any logic involved in assuming that Moss did not follow the maps and looked into a crystal ball and knew to appraise the correct and larger amount of land. Is there any logic to support that Alabama Power cruised and appraised 15.71 acres of land and timber, when they presented Perry with a written statement June 15, 1978 (DX 5A) which states the acreage cruised and the acreage appraised to be 9.76 acres. After maps were corrected all parties and court agree that there were 15.71 acres land and timber taken. Is there any logic to assume that Alabama Power knew the maps were wrong in 1976 when they appraised and yet when asked to correct the maps in 1978 they responded with the erroneous deeds that supported their erroneous maps and affirmed in (DX 5A) that their maps were correct and that they had appraised and cruised 9.76 acres. Is there any logic to assume Alabama Power knew the maps wrong and yet waited two years to correct even though land was being appraised and cruised with the use of those

erroneous maps? Is there any logic to believe that Alabama Power cruised timber in July 1978 when in fact on June 15, 1978 Alabama Power presented Perry with a written statement of cruise, more than a month before cruiser claims he was on the property. Doesn't this show that Alabama Power is covering up the correct cruise date and falsifying it to try to assume they knew of map changes.

Perry presented a preponderance of evidence in addition to proving maps incorrect at date of appraisal and cruise. Appeals Court (1986) states Perry proved maps were incorrect. This was the condition stated by 1983 Court of Appeals, which would justify further compensation for land and timber. Court of Appeals still awards no compensation. Commission found that Perry was due added compensation for timber but District Court reversed and paid nothing. Statement that Commission misstated reason for granting payment and used the wrong standard does not preclude the fact that Perry met the burden of proof and exceeded it. It was Commission improperly reporting its findings not Perry's lack of evidence that is the problem. To take Perry's property without compensation because the Commission made an error is a violation of due process. Likewise to take under improper instruction also violates due process and just compensation.

United States v. 881.39 Acres of Land, 254 F Supp 294 (DC Okla 1966). In this case the court held that a court may not substitute its judgement for that of the commission and set aside awards merely because they might be different from those which the court might have fixed.

Conclusion: The 1986 Court of Appeals subtly yet significantly, misdirected it's analysis of this case to tainted testimony of the 1984 Commission hearing rather than to the testimony of the 1981 Commission hearing upon which the 1983 reversal was based along with that reversal. 1986 Court of Appeals reasoning is flawed because it does not clearly examine the previous facts (1981) and reversal along with proper instruction from 1983 reversal as compared with instruction of District Court on remand.

Court of Appeals (709 F 2d 666,1983) reversed District Court on four issues: (1) Since Commission and District court did not include the value of riparian rights in total value awarded in 1981, determine and disclose the value of riparian rights and pay Perry for them. (2,3) Alabama Power only appraised land and cruised timber that was on the maps as they existed at the date of appraisal and date of cruise irregardless of what Alabama Power said it appraised or cruised. If maps wrong on those dates make appropriate adjustments. (pay Perry added compensation). (4) Determine if another amount of land was left off maps after August 10, 1978 correction date. Pay Perry for it. Then Appeals Court (1983) said:

> Affirmed in part; reversed in part and remanded for further proceedings not inconsistent with this opinion. (709 F 2 d 669).

District Court, in spite of this clear order on remand has been any thing but consistent with the findings of appeals court above.District Court totally disregarded this reversal and what it actually said, using its biased instruction to circumvent the facts and meaning of the reversal and

completely fails to make a finding on land appraisal. The ultimate findings of District Court reverses Appeals Court 1983 and awards no payment as directed by reversal. Its finding and instruction is totally inconsistent with reversal and its order on remand.

Appeals Court affirms but it only addresses two issues and those under false instructions and in so doing reverses the finding of fact and refuses to enforce the requirements of the previous court of appeals, there by reversing itself. Four issues on appeal were never addressed, the all important issue of instruction, biased or incompetent Commissioners, Biased Judge, the issue of land appraisal clearly reversed by appeals (1983) and not addressed by District Court, and the issue of eroded land. This clearly violates Due Process and just compensation.

There can be no order in the Courts if the opinion of the Court above carries no weight with the court below. District Court shows a high disregard for Perrys constitutional rights of just compensation and Due Process and for any authority from the Court of appeals. It grants no relief and uses instruction to circumvent reversal, and this is condoned by 1986 Court of Appeals.

There is nothing logical or fair about the outcome of the case and the result is clearly wrong. The issue of instruction on remand must be addressed.

Perry has been denied use of this property for 8 years because of the cost of building more than a mile of access roads and purchase of right of way from others. There is nothing just about the compensation for this property taken.

The entire award for $14,350.00 will not pay for regaining access alone. The property was split by water after the taking, leaving one section of property land locked with no access and no compensation for taking that access road.

The main body of the property can no longer be reached by road as before, because Alabama Power only paid a fraction of the value for a replacement road by falsifying its testimony of both the length and cost per foot of a new road. No compensation at all for 15,000 feet of fence, no compensation for the entire riparian rights and water supply, no compensation for minerals, about half payment for raw land and timber because of use of faulty maps, false testimony, faulty instruction and bias. Miles of remaining fences have wasted and an on going Cattle Ranch business was destroyed with no compensation. This was little more than legalized larceny. The appeals court in affirming and refusing to properly address the issues has denied the Constitutional rights to own property, to receive just compensation in eminent domain proceedings, to receive due process and to receive a Jury Trial. It is clearly wrong.

United States v. Sowards 370 F 2d 87 (1966) P.89. The Fifth amendment of the United States Constitution provides that private property will not be taken for public use without just compensation. The soverign must place the owner in as good a position pecuniarily as he would have been if his property was not taken.

Appeals Court and District Court has held that there is no right to a Jury Trial as guaranteed by the United States Constitution. Yet the case is to follow Alabama law according to 1983 reversal. Title 19 section 17 of Alabama law states specifically that on appeal from Commission a Jury Trial is

required and states that the amount of award to be assessed is a question exclusively for the Jury. Mobile, etc., Co. v. Louisville etc., R. Co., 192 Ala. 136, 68 So. (2d) 305; Alabama Power Co. v. Thompson, 250 Ala. 7, 32 So. (2d) 795.

District Court refuses to abide by its own instruction or enforce it, makes conclusionary findings not supported by testimony, makes false statements in its opinion, refuses to recuse himself and allow a fair trial.

Its instruction encourages, speculation, contradiction and false testimony which is accepted and affirmed by 1986 appeals court.

It is therefore respectfully requested that this Honorable Court grant Certiorari in this cause

Respectifully submitted

Robert A. Perry Pro se

Appendix A

ALABAMA POWER CO. v. 1354.02 ACRES OF LAND

ALABAMA POWER COMPANY, a corporation, Plaintiff-Appellee.

v.

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, and Gladys Graves, et al., Defendants-Appellants. 709 F.2d 666 (11th Cir.1983)

No. 82-7352
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

July 11, 1983

Property owner appealed from an order of the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, awarding damages in eminent domain proceeding. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights; (2) district court erred in assuming that the commissioners who were appointed to determine compensation took the riparian values into account in assessing the total land value, because the property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's instructions to commissioners were not so clear that the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; and (3) district court erred in upholding commissioners' determination that all of the land

at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps.

Affirmed in part; reversed in part and remanded.

1. Federal Civil Procedure 2068

In condemnation proceeding, trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights, because there is no constitutional right to a jury in an eminent domain action. Fed.Rules Civ. Proc.Rule 71A(h), 28 U.S.C.A.

2. Eminent Domain 124,145(1)

In eminent domain proceeding, property owner must receive just compensation for condemned property, without regard to any enhancement of the remaining land: damage to remaining land, however, may be offset by enhancement in the value of that land.

3. Eminent Domain 63,124

Once land containing water and access to that water is condemned, the taking is complete, and enhancement of remaining land may not be set off against the riparian rights.

4. Eminent Domain 238(6), 263

In eminent domain proceeding, district court erred in assuming that commissioners who were appointed to determine compensation took riparian values into account in assessing total land value, because property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's

instructions to commissioners were not so clear that the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; therefore, cause would be remanded on issue of riparian rights to ensure that property owner was compensated for value of those rights taken.

5. Eminent Domain 186,263

In eminent domain proceeding, district court erred in upholding commissioner's determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps; cause would be remanded to provide property owner an opportunity to prove that condemnor appraised insufficient acreage.

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

On November 14, 1978, Alabama Power Company filed a complaint in condemnation in the United States District Court for the Middle District Of Alabama pursuant ot 16 U.S.C § 814. After disposing of certain issues on summary judgement the court appointed three commissioners to determine compensation due landowners pursuant to Fed.R.Civ. P. 71 A (h).Appellant's case was joined with the cases of other parcel owners pursuant to Fed.R.Civ.P. 71A(b).The commissioners assessed compensation due appellant at $14,350. Appellant thereupon brought exceptions to the commissioners' report before the district court, said exceptions being heard on August 12,1982. On September 17,1982 the district court entered a memorandum opinion and order confirming the commissioners' report and

setting compensation at $14,450. Perry appeals the district court's order.

Appellant raises seven grounds on appeal. All but the jury trial issue relate to findings of the commissioners, and were raised and resolved before the district court. The jury trial issue was addressed in the order of the district court appointing the commissioners On the issues of compensation for minerals, damages to remaining land, best use a;nd improvements we affirm on the basis of the opinion below. On the basis of the remaining issues, discussed infra, we affirm in part, reverse in part, and remand.

1. Jury Trial

{1} Appellant argues that the district court's refusal to try the issue of condemnation to a jury, despite appellant's jury demand, was a violation of his constitutional rights. The Federal Rules of Civil Procedure specifically provide for the appointment of commissioners in lieu of a jury, however, in condemnation actions in which the district court determines that the ends of justice best would be served by foregoing trial by jury. Fed.R.Civ.P. 71A(h). We have held that rule 71A(h) does not offend the right to trial by jury, there being no constitutional right to a jury in an eminent domain action. United States v. 5.00 Acres of Land, Etc., 673 F.2d 1244 (11the Cir.1982). The court below made appropriate findings that the ends of justice would be served best by appointment of commissioners. Accordingly, this claim is without merit.

2. Compensation for Riparian rights and Damages

Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. appellee responds that "[t]he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission...and the District Court... found enhancement to the remainder as a result of the reservoir" The Commission mentioned appellant's claim as to riparian

rights, but made no finding. The district court assumed the riparian rights "must have been" considered in assessing the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellees, however, this assumption was error.

Compensation for the taking pursuant to 16 U.S.C. §814 is a question of federal law, which is resolved here by reference to Alabama law. See Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980) (en banc). The Alabama Code clearly states that except in cases involving condemnation for highways or water conservancy projects, enhancement to the remaining land is not to be considered in determining "just compensation" for the land taken. Section 18-1-18, Code of Alabama (1975). That provision has been construed, however, not to preclude consideration of enhancement of the remaining land to offset damage to the remaining land. Town of Eutaw v. Botnick, 150 Ala. 429,43 S. 739 (1907).

[2,3] In other words, there is a distinction made between the land taken and the land remaining. The property owner must receive "just compensation" for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land, however, may be offset by enhancement in the value of that land. Appellant's claims for damages due to interference with watering rights, for example, clearly are damages to remaining property which, under the Town of Eutaw rationale, may be offset by any enhancement. That is not the case, however, with riparian rights. Once the land containing water, and access to that water, is condemned the taking is complete. Those rights are akin to condemned real property. Enhancement, therefore, may not be set off against riparian rights. As riparian rights fall on the "taking" side of the equation, denial of the rights must be compensated.

[4] An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for the riparian rights in the relevant condemned area. Appellant apparently introduced that

statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took the riparian values into account in assessing the total land value.

This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

3. The Area Cruised for Timber

[5] Appellant claims the timber cruiser failed to cruise all of appellant's property, with the result that appellant was inadequately compensated for his timber and land. The basis for this allegation is a claimed discrepancy between the actual property and the map utilized by Alabama Power to assess the amount of compensation and guide the cruisers. Further, appellant claims an additional amount of acreage has eroded, or been "pressed down," to below the contour line at which his property commences. The Report of the commissioners does not mention this contention of appellant.

The district court upheld the ultimate finding of the commissioners as to the amount of compensation. As to the two issues concerning acreage (payment for timber and for land) the court acknowledges that there is evidence to support appellant's contention; nevertheless, the court finds the commissioners' determination that all the land was appraised "not clearly erroneous." We disagree.

It appears appellant attempted to raise the validity of the survey maps before the commissioners, but they declined to hear the evidence, finding it outside their jurisdiction. The

timber cruiser and appraiser testified they appraised all the land, as indicated on the maps. It the maps were incorrect, however, their determinations as to the proper amount of compensation would be incorrect as well. As the commissioners demurred to the question of whether Alabama Power's maps were correct, it was incumbent upon the district court to hear appellant's testimony and permit him an opportunity to prove his case. Upholding the determination of the commissioners as "not clearly erroneous" when they failed to provide appellant an opportunity to prove his point was a clear error of law.

The district court, in an argument adopted by appellee before this court, held alternatively that as the total timber value awarded by the commission exceeded that calculated by appellant, there was no harm done appellant. This argument does not satisfy the legal requirement of "just compensation." The amount of money awarded for timber is a product of two variables; acreage and per acre timber value. The commissioners found as a fact that the per acre figures should have been higher than those suggested by appellant. That determination is separate from, and irrelevant to, a determination of the total acreage. if appellant is correct that Alabama Power cruised the wrong number of acres, then appellant is entitled to the correct acreage multiplied by the per acre dollar figure arrived at by the commissioners. We remand therefore, to provide appellant an opportunity to prove that Alabama Power appraised and cruised insufficient acreage, and for whatever adjustments are thereby required.

AFFIRMED IN PART; REVERSED IN PART and REMANDED for further proceedings not inconsistent with this opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation

Plaintiff,

v. CIVIL ACTION 78-213-E

1354.02 ACRES, Etc.,et al.,

Defendants.
Filed Jan. 15,1985

JUDGEMENT

In accordance with the opinion entered in the above-styled cause on this date and in accordance with the Report of the Commissioners filed September 26, 1984 as modified by such opinion, it is

ORDERED, ADJUDGED and DECREED by this court that Robert A. Perry and wife, Sarah K. Perry, as owners of interests in the property taken, have and recover of the plaintiff the sum of $14,350.00 together with the interest thereon from the date of the plaintiff's entry into possession of the property until the date of this judgement, as just compensation for the taking of the property involved here.

DONE this the 15th day of January, 1985.

R. E. Varner

United States District Judge

Appendix C
IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v. CIVIL ACTION NO.78-213-E

1354.02 ACRES, Etc., et al.,

Defendants.
Filed Jan. 15, 1985

OPINION

Pursuant to an order of remand from the Eleventh Circuit Court of Appeals dated July 11, 1983, reported as Alabama Power Company v. 1354.02 Acres of Land, 709 F.2d 666 (11th Cir. 1983), this court referred the ascertainment of just compensation to the commission for further proceedings on several points. The matter is now before this Court on objections by both the plaintiff and the defendants to the Commission's report on the order of remand.

Although the facts are set forth in the Commission's first report and this Court's opinion affirming that report, it is

appropriate to briefly outline the aspects of the case relevant to the present proceedings.

On November 14, 1978, Alabama Power Company filed suit in this Court for the condemnation of various tracts of land for its proposed Harris Reservoir. This Court appointed commissioners for a determination of the compensation due the landowners. The commissioners assessed the compensation due at $14,350.00. This Court subsequently entered an order confirming the commission's report, and the defendant appealed. Although the appeal raised a number of issues, the Court of Appeals found merit in only three of the defendant's points and remanded the case to the District Court for further proceedings on those issues. Consistent with that order of remand, this Court remanded the cause to the Commission for consideration of the following:

> 1. In assessing the total value of the land taken, did you consider the value, if any, of riparian rights?
>
> If your answer is "no", please take into consideration such value and report the gross total value of the land taken to the Court. In doing so, you must not offset enhancement to the remaining property against the value of riparian rights, but you may consider it to offset damages, if any, to the remaining land. For instance, it may be

considered to offset damages for interference with rights to water livestock running on the remaining lands.

2. In assessing the total value of the land taken, did you consider and include in your evaluation of land taken whether or not any additional amount of land had eroded or been pressed down below the contour line at which defendant Perry's property commences?

If your answer is "no", please include in your report the value of any such additional land, if any.

3. Did the condemnor's appraisers appraise acreage less than that actually at issue?

If your answer is "no", please include in your report the value of any such additional land, if any.

Pursuant to the Court's order, the Commission reconvened in Opelika, Alabama on the 7th day of August, 1984. The Commission announced an affirmative response to the first question certified by the District Court, and the par;ties were allowed to offer evidence as to the second and third questions. On September 26, 1984, the Commission filed its report, as to which both parties filed written objections. These objections were heard by this Court on January 2, 1985.

This Court has reviewed the transcripts of the proceedings before the Commission and heard oral argument by the

parties with respect to their objections to the Commission's report. In considering the objections, it is necessary to review the legal standards governing review of the report of the Commissioners.

Fed. R. Civ. P. 71A (h) provides that "if a commission is appointed it shall have the powers of a master provided in subdivision (C) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53." Fed. R. Civ. P. 53(e) (2) further provides that:

> In an action to be tried without a jury, the court shall accept the master's finding of fact unless clearly erroneous. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Thus, this Court may set aside a finding of fact by the commission if that finding is "clearly erroneous". United States v. Merz, 376 U.S. 192, 198 (1964); United States v. Certain Lands in the City of Statesboro, 341 F.2d 742, 744 (5th Cir. 1965). As noted by the former fifth Circuit Court of Appeals, "Under the clearly erroneous concept, a finding

is to be set aside when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Certain Lands in the City of Statesboro, 341 F.2d 742,744 (5th Cir. 1965); see also United States v. Waymire, 202 F.2d 550,553 (10th Cir. 1953). If the District Court determines that the commission's findings were in fact clearly erroneous, Fed. R. Civ. P. 53(e) (2) outlines the options available to correct those findings. Specifically, "it may modify the report on the basis of the record made before the commissioners, or it may reject it in whole or in part or may receive further evidence or may recommit it with instructions". United States v. Merz, 376 U.S. 192, 199-200 (1964); United States v. Hilliard, 412 F.2d 174, 177 (8th Cir. 1969). Applying this concept, the Fifth Circuit Court of Appeals has stated that:

> We do not think the power to modify is to be narrowly construed or applied. The power to modify is a power to alter or change, and to enlarge and add as well as to limit, restrict or reduce. The District Court could have rejected the commission's findings had they been clearly erroneous. Had this been done, the District Court could have substituted its own findings based upon the evidence before the commission.

United States v. Tampa Bay Garden Apartments, Inc., 294 F.2d 598, 603 (5th Cir. 1961). In determining whether or to what extent a report should be modified, the District Court may refer to the transcripts and records compiled by the commission without the necessity of a de novo hearing or similar compilation of additional evidence. Merz, 376 U.S. at 200; United States V. 1,162.65 Acres of Land, 498 F. 2d 1298, 1302 (8th Cir. 1974); Tampa Bay Garden Apartments, Inc., 294 F.2d at 603.

The principles outlined above have no application, however, in the context of a court's review of a commission's application of the law to the facts. Thus, where a commission applies an incorrect legal standard, its findings are not protected by the "clearly erroneous" standard applicable to findings of fact. Fogel v. Chestnut, 668 F.2d 100, 116-17 (2nd Cir. 1981); United States v. 620.98 Acres of Land, 255 F. Supp. 427, 431 (D. C. Ark. 1966); See, Generally, 5A J. Moore, Moore's Federal Practice ¶53.12 [Second Edition 1984]; 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2614 (1971). As noted by one commentator, "the master's conclusions of

law... carry no weight with the court." 9 Wright and Miller, supra, at § 2614.

Guided by these principles, this Court makes the following findings with regard to the questions certified to the Commission:

1. Riparian Rights. In its first opinion, this Court stated that whatever loss the claimant may have suffered with regard to riparian rights was not independent of the value of the land, and therefore must have been considered by the commissioners in their appraisal of the land. The Eleventh Circuit Court of Appeals found fault in this view and remanded consideration of that issue to this Court. This Court in turn certified the question of riparian rights to the Commission. In its Report On Order of Remand, the commission confirmed that it had considered all of the elements of the value of the land taken in the first hearing, including any riparian rights. Further, the Commission requested the appraiser for Alabama Power Company, Mr. Moss, to state whether his earlier testimony on the value of the land taken had considered riparian rights. Mr. Moss testified that he had considered the riparian rights in valuing

the property to be taken. consequently, the Commission unanimously concluded that its previous valuation of the condemned property included consideration of the value of the riparian rights associated therewith. Upon review of the transcripts of both hearings, this court finds nothing in the record to indicate that the Commissioners' finding is clearly erroneous. To the contrary, this Court believes that the great weight of the evidence supports the conclusion that the Commission considered the value of riparian rights in its earlier findings.

11.Change of Contours. The Court of Appeals also remanded for consideration of a contention by the defendant that a portion of the property had been pressed down below the 790 contour line, so that more property was taken than was described in the complaint. The Commission did not address this issue in its first report. At the August 7, 1984 hearing, however, the Commission allowed the parties to offer evidence bearing on this question.

The property in issue is an island formed by the 790 foot contour that Mr. Perry contends had once been connected to

the land described in the complaint by a 180-foot isthmus. Mr Perry testified that his family had exercised ownership over this parcel of property and that from time to time he had removed storm damaged timber from it. He contended that the elevation of the isthmus had been lowered below the 790 contour by logging operations and other activities, which in turn separated the island from the rest of his property because the property line is the 790 contour at this location.

Mr. Perry's surveyor testified that, according to a survey done by him on October 10, 1983, the 790 contour surrounded the island as shown on a survey drawing which was received as evidence. He also stated that he had observed blazes on the trees surrounding the island as well as along the 790 contour on the main body of the Perry land on a visit to the property in 1976. He expressed the opinion that in 1976 the 790 contour extended to form a strip connecting the island to the Perry Property described in the complaint. However, during the 1976 visit the witness testified that he had observed no blazes along the claimed isthmus leading from the main body of land to the island. Moreover, he admitted on cross-examination that his belief

as to the location in 1976 of the 790 foot elevation between the Perry land and the island was formed without having done a survey of the 790 elevation.

Plaintiff called as a witness Mr. Billy McCollough, a forester for Alabama Power Company, who testified that he was familiar with the area and had marked the 790 contour on this property on at least two prior occasions. Mr. McCollough testified that, to the best of his knowledge, there had never been an isthmus or land bridge between the main body of the Perry property and the island. Plaintiff also produced a 1967 contract for the sale of timber in this area, showing as Alabama Power Company land the island and the so-called isthmus. Plaintiff also introduced its deed dated February 20, 1929, by which it had obtained title to all property below the 790 contour as well as islands created by the 790 contour.

Noting that Mr. Perry's theory that the contour had been lowered along a 186-foot strip was unlikely, the Commission concluded that he had failed to prove ownership of the area encompassing the island and the so-called isthmus. Consequently, the Commission determined

there was no justification for any award to the defendant for that property.

This Court concludes that this finding by the Commission is well-supported by the evidence and is not clearly erroneous.

111. Appraisal of Acreage Less Than That actually At Issue.

In its opinion remanding this matter for further consideration, the Eleventh Circuit Court of appeals instructed this Court to provide Mr. Perry an opportunity to prove that the plaintiff cruised the timber on less than all of the condemned land. At the August 7, 1984 hearing, the Commission allowed both parties to offer evidence bearing on this question.

The controversy concerning this item arose out of map revisions dated in August, 1978 , reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The plaintiff's cruise of the timber, however, was made on July 25 and 26, 1978. Mr Perry contends that, without the benefit of the revised

maps, the plaintiff's cruise of the area must have been incomplete.

Mr. Moss, the Plaintiff's appraiser, stated that the property line issue was brought to his attention by Mr. Perry in 1976. The dispute was later resolved, and the plaintiff conceded that Mr. Perry had title to the additional property. Mr. Moss testified that although the maps had not been revised as of July 25 and 26, 1978, he was aware of the acreage change occasioned by the property line alteration at that time and that he informed the timber cruiser, Mr. John White, of the change, Mr. Moss also testified that he accompanied Mr. White to the tract and advised him as to the proper area to be cruised.

Mr. John White cruised the timber for Alabama Power Company in July of 1978. He had no specific recollection as to what he had cruised or whether Mr. Moss accompanied him to the property. However, he stated that his working map did not have the Perry property outlined and that, therefore, he had not located the land himself and Mr. Moss must have accompanied him. Both Mr. Moss and Mr. White testified to their routine practice during the summer and fall

of 1978 as to review of each map revision to determine the need for changes in timber cruises and appraisals. No such changes were deemed necessary for this property.

On a per acre basis assuming a cruise of the entire 15.71 acres, Mr. White's assessment of the value of the timber compared favorably with a valuation of the timber per acre between elevations 793 and 800 by Mr. Morris, one of Mr. Perry's witnesses in the earlier hearing. The White cruise and the Morris cruise were the only evidence of value by actual timber count. The Commission also received testimony that the additional land under consideration consisted of bluff land, pastureland, creekbed and timber production land.

In his closing argument, the defendant raised contentions as to measurements and estimations of the eastern boundary of the property by Mr. Ray Edwards, the surveyor who had testified earlier regarding the alleged isthmus in the western part. Mr. Edwards did not testify concerning these measurements. Similarly,although Mr. Perry contended that Mr. Edwards had made a sketch of the area, no sketch was introduced and Mr. Perry conceded that the sketch was not a

survey of the area. No ties had been made to establish corners, and points of reference were elevations that were estimated because they were under water.

Based on this evidence, the Commission unanimously determined that the defendants were not entitled to an award for additional land on the eastern boundary not included within the plaintiff's original survey. This Court believes this conclusion is well supported by the evidence and not erroneous. Moreover, the point was not one of the subjects of the remand by the Court of Appeals.

With regard to the claim for additional compensation for timber not included within the previous award, the majority of the Commission awarded the claimant additional compensation, although one Commissioner dissented. Specifically, the majority found that "enough doubt exists from the evidence that an additional award of $2,653.83 is due the defendant for timber which probably was not included in the previous award." The third commissioner, however, determined that the preponderance of the evidence indicated that all of the timber was included within the original award.

For the reasons outlined below, this Court is compelled to modify the Commission's finding on this item and to overturn the award of additional compensation for timber.

As noted above, the Commission's conclusions of law carry no weight with the District Court. See Fogel v. Chestnut, 668 F.2d 100, 116 (2nd Cir. 1981); See generally 5A J. Moore, Moore's Federal Practice, ¶53.12[5] (1984). On item 111, two of the commissioners applied an incorrect legal standard both as to the burden of proof and the placement of that burden. Their finding was that "enough doubt exists from the evidence that an additional award ... is due the defendant for timber..." This represents a clear misapplication and misstatement of the correct legal standard with regard to the burden of proof. As this Court instructed the Commission, the landowner bears the burden of proving his damages and the compensation to which he is entitled by a preponderance of the evidence. E.g., United States v. Smith, 355 F.2d 807, 809 (5th Cir. 1966); Morgan v. United States, 356 F. 2d 17, 20, (8th Cir. 1966); United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama, 214 F. Supp. 148, 150-51 (M. D.

Ala. 1963). On Item No. 111, however, the majority of the Commission employed a standard of reasonable doubt rather than the required preponderance standard. Moreover, the standard employed by the majority apparently misplaced the burden of proof on this issue in requiring the plaintiff to erase any doubt that the additional timber was included in the previous award. The dissenting Commissioner correctly imposed the burden of proof on the landowner and applied the proper preponderance standard. In light of this misapplication of the law to these facts, this Court is compelled to modify the Commission's findings. The Court concludes that Commissioner Pinkston applied the proper legal standard to the facts as recited in the Commission's Report and reached the correct result in this case.

Even if the majority of the commission had made the additional award for timber based on a preponderance of the evidence standard, this Court would conclude that its findings were clearly erroneous and thus subject to modification under Fed. R. Civ. P. 53 (e) (2). As Commissioner Pinkston noted, "the preponderance of the evidence was to the effect that all of the timber was included

in the original award." Mr. Perry's only evidence that Mr. White did not cruise all of the timber was that the map had not been revised as of the date of Mr. White's cruise. The plaintiff, however, produced persuasive evidence that Mr. White was aware of the correct area to be cruised at the time he appraised the timber and that he thus conducted a complete appraisal of the timber. This conclusion is supported by a comparison among the per acre timber values produced by the original commission report, Mr. White's cruise as attributed to the entire 15.71 acres and the cruise performed by Mr. Perry's expert, Mr. Morris. The great weight of the evidence leads to the conclusion that Mr. White included the value of the additional timber in his original cruise, and that the original commission report included compensation for all timber taken.

This Court is convinced that the majority of the Commission committed a mistake in awarding Mr. Perry additional compensation for timber. As a result, this Court will modify the Commission's finding on Item No. 111 and overturn the Commission's award of additional compensation. Fed. R. Civ. P. 53(e) (2); United States v.

Merz, 376 U.S. 192, 199-200 (1964); United States v. Certain Lands in the City of Statesboro, 341 F. 2d 742, 744 (5th Cir. 1965).

Judgement will be entered in accordance with the Report of the Commissioners with regard to Item Nos. 1 and 11 as well as the question raised regarding the eastern boundary. With regard to Item No. 111, the Court modifies the Commission's report to conform with this opinion. Consequently, this court denies any additional compensation for timber condemned by the plaintiff.

Done this the 15th day of January, 1985.

R.E. Varner

United Stated District Judge

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

NO. 85-7146

ALABAMA POWER COMPANY,

Plaintiff-Appellee,

versus

1354.02 ACRES,MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, AND GLADES GRAVES, et al,

Defendant-Appellant.

ROBERT A. PERRY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

(May 30, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM;

The appeal in this condemnation suit simply questions whether there is sufficient evidence to support the district court's determination that appellant property owner was adequately compensated for riparian rights and timber on the condemned land. We affirm.

This is the second time this case has been before this Court. On November 14, 1978, Alabama Power Company filed a condemnation complaint in the United States District Court for the Middle District of Alabama. The District Court appointed commissioners to determine compensation due the affected owners. The commissioners determined that appellant, Perry, was due $14,350. Perry took exception to the commissioners' determination.

The district court, in a memorandum opinion and order dated September 17, 1982, affirmed the commissioners' compensation award. On appeal, this Court affirmed in part, and remanded for a determination of whether Perry had been

adequately compensated for riparian rights and whether the Power Company had cruised the correct acreage of timber. Alabama Power Company v. 1354.02 Acres of Land, 709 F.2d 666 (11th Cir. 1983).

Pursuant to this Court's order, the district court reconvened the commissioners. They determined that while Perry had been adequately compensated for riparian rights, he had been inadequately compensated for his timber. Therefore, the commissioners made and additional award. The district court adopted the commissioners' determination on the issue of riparian rights, but reversed the Commissioners determination that Perry had not been adequately compensated for his timber.

The first question is whether the district court's finding that Perry was justly compensated for riparian rights is clearly erroneous. In our earlier decision, this Court noted that the district court assumed that Perry "must have been paid" for riparian rights because the commissioners mentioned Perry's claim to such rights. The commissioners, however, made no express finding as to compensation for riparian rights. We remanded for a clear determination on the issue. In their

second report, the commissioners stated they had considered "all elements of the value of the land taken in the first hearing, including any riparian rights." The appraiser for Alabama Power Company, Mr. R.E. Moss, testified that he had considered the riparian rights in valuing Perry's property. The district court then determined that the great weight of the evidence supported the conclusion that the amount previously awarded conpensated Perry for riparian rights. The conclusion is not clearly erroneous. As a matter of law, an award of just compensation is not required to include a separate item for riparian rights if, as here, such rights are taken into account with other elements making up the fair market value of the property taken.

Second, Perry contends he was not compensated for the correct acreage of timber on his property. This issue arose out of map revisions dated in August 1978, reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The Power Company's cruise of the timber, however, was made on July 25 and 26, 1978. Perry alleges that because the

appraiser did not have the revised August maps when the cruise was made in July, the cruise of the area must have been incomplete.

The commissioners found that Perry was due additional compensation, but the district court overturned this award. The district court held the commissioners applied incorrect legal standards as to the burden of proof. The district court correctly held that the landowner bears the burden of proving his damages and the compensation to which he is entitled by a Preponderance of the evidence. E.g., United States v. Smith, 355 F 2d 807, 809 (5th Cir. 1966); United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama, 214 f. Supp. 148, 150-51 (M.D. Ala. 1963). Applying the correct standard, the district court held that Perry failed to carry his burden on the timber argument. Perry's evidence consisted solely of the fact that the map had not been revised as of the date of the Power Company's cruise. The Power Company's appraiser, however, testified that he was aware of the incorrectness of the map and conveyed this knowledge to the timber cruiser, and as a result, the appraisal included the area in dispute. This

testimony, the district court noted, is supported by a comparison among the "per acre" timber values produced by the original commissioners' report and the cruise performed by Mr. Perry's expert. The district court's finding upon which it based a modification of the commissioners' determination was not clearly erroneous.

AFFIRMED.

HATCHET, Circuit Judge, dissenting:

In the previous opinion in this case, we held:

> An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the Federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for riparian rights in the relevant condemned area. Appellant apparently introduced that statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took riparian values into account in assessing the total land value.
>
> This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the

commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by the appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

709 F.2d 668. In spite of these clear directions, Alabama Power Company has failed to disclose and the district court has failed to make findings regarding the value to be assigned riparian rights.

Although nothing in the record has changed, the majority here dismisses the riparian rights claim by stating: "The great weight of the evidence supported the conclusion that the amount previously awarded compensated Perry for his riparian rights."

Slip Op. at____. As a practical matter, our remand afforded this appellant no hearing on the issue framed by his appeal, no explanations as the why the issue is not addressed as directed, and no relief.

I would again remand the case to the district court with instructions to have Alabama Power Company disclose and the district court make a finding of the value assigned to riparian rights.

Appendix E

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
50 Spring Street. S.W.
Atlanta. Georgia 30303-3147

July 29, 1986

Miguel J. Cortez
Clerk (Rev.10/84)

TO ALL PARTIES LISTED BELOW:

No. 85-7146 - ALABAMA POWER COMPANY v. 1354.02 ACRES, etc., et al. (ROBERT A. PERRY, Appellant)

(DC # 78 - 213 - E)

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

_____ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

__XX__ No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure, Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

Miguel J. Cortez, Clerk

By: Henrietta Barnes

Deputy Clerk

cc: Mr. Robert A. Perry, Pro Se

Edward S. Allen, Esquire

Appendix F

IN THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

NO. 85 - 7146

ALABAMA POWER COMPANY, Plaintiff-Appellee,

versus

1353.02 ACRES, MORE OR LESS,
OF LAND IN RANDOLPH COUNTY,
ALABAMA and GLADYS GRAVES Defendants,

ROBERT A. PERRY, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(OPINION May 30, 11 Cir., 1986, ____ F.2d__).
(July 29, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and Nichols*, Senior Circuit Judge.
PER CURIAM:

(x) The petition for rehearing is DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PAUL H. RONEY
United States Circuit Judge
*Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-788

In The
Supreme Court of the United States
October Term, 1986

ALABAMA POWER COMPANY,
a corporation,

Respondent,

v.

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, AND ROBERT A. PERRY, et al,

Petitioner.

Petition For a Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Will This Court Grant A Petition For Certiorari To Retry Fact Issues Concerning The Amount of Compensation Paid In A Condemnation Case?

2. Does This Petition Present A Serious Issue Of Federal Law?

   a. Must an appellate court discuss in its opinion each issue raised and briefed by the parties?

   b. Does the mere fact that a judge rules against a litigant require the judge to recuse himself upon remand?

   c. Did the Eleventh Circuit correctly determine that the District Court followed the Eleventh Circuit's remand directions in instructing a commission appointed to fix compensation under FRCP Rule 71A?

3. Does Petitioner Demonstrate Conflict Among Courts Concerning Any Dispositive Legal Issue Presented By This Petition?

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No. 86-788

In The
Supreme Court of the United States
October Term, 1986

ALABAMA POWER COMPANY,
a corporation,

Respondent,

v.

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, AND ROBERT A. PERRY, et al,

Petitioner.

Petition For a Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Alabama Power Company,[1] respectfully requests that this Court deny the Petition for Writ

[1]As required by Rule 28.1 of this Court, a listing of all parent companies, subsidiaries, and affiliates of respondent Alabama Power Company follows: The Southern Company, a

(Continued on following page)

of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the District Court without published opinion. The opinion is attached as Appendix H. The order denying rehearing is attached as Appendix I. The United States District Court for the Middle District of Alabama likewise issued no published opinion. Its unpublished opinion is attached as Appendix J.

STATEMENT OF THE CASE

This is a unique, fact specific case. Respondent strenuously objects to petitioner's Statement of the Case, which misrepresents settled facts. Because petitioner grossly distorts the record, respondent offers its own Statement of the Case.

Respondent is a private, investor-owned electric utility that services over 1,000,000 customers in 56 of Alabama's 67 counties. Respondent is licensed by the Federal

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(Continued from previous page)

registered public utility holding company, is the parent company of and holds all the common stock in Alabama Power Company. Other subsidiaries of The Southern Company are Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc., and Southern Electric International, Inc. Alabama Power Company owns a 50% interest in Southern Electric Generating Company.

Power Commission (now Federal Energy Regulatory Commission) to operate certain hydro-electric generating plants. Under the Federal Power Act, 16 U.S.C. § 814, *see* Appendix C, respondent has the power to condemn private property for use in the generation of electricity.

Petitioner owns land in Randolph County, Alabama. The sole issue presented by this petition is the amount of compensation due petitioner for real property condemned by respondent under 16 U.S.C. § 814. Petitioner seeks review of the second of two decisions by the Eleventh Circuit in this case. The only questions before this Court concern whether the Eleventh Circuit properly found that the District Court followed its instructions on its remand of the issues of compensation paid for riparian rights and the determination of acreage condemned. *See* Appendices A (Fourteenth Amendment due process clause) and B (Fifth Amendment). Petitioner contends essentially that he was not compensated for riparian rights taken, and that he was not compensated for the correct amount of acreage. On the latter issue, petitioner claims that the acreage condemned did not include an isthmus he owned but that had been "pressed down" by logging machinery beneath the 790 contour to which his property is confined. Petitioner claims further that errors on the appraiser's survey map caused the appraiser to neglect to credit him for all acreage he owned.

On November 14, 1978, respondent filed a complaint in condemnation pursuant to 16 U.S.C. § 814. Included in the parcels to be condemned were fifteen acres owned in fee by petitioner. Contrary to petitioner's contention, *see* Petition at 2[2], petitioner owned no mineral

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[2]Respondent shall reference pages in petitioner's Petition for Certiorari as "Petition at ——" followed by the page number.

rights in the area for which he sought compensation for an alleged gold mine. *See* Appendix S at A76-77. Respondent sought 10.64 acres, which lay below elevation 795, for a power pool reservoir and surcharge storage area. Respondent planned to use the remaining 5.07 acres, located between elevations 795 and 800, for shoreline control purposes.

Petitioner filed his answer to respondent's complaint on December 11, 1978. By order entered March 15, 1979, the District Court granted respondent's summary judgment motion on the issue of the right to condemn. Respondent, by motion filed December 15, 1980, moved to amend its complaint to conform to an amendment to the project license, so as to condemn an easement for shoreline control, and not acquire fee simple title, to the subject 5.07 acres. The District Court granted respondent's motion by order entered December 18, 1980, and, by subsequent order, granted respondent summary judgment on the issue of the right to condemn the easement for shoreline control between elevations 795 and 800. Petitioner took no appeal from any of these orders and has never otherwise questioned their validity.

The District Court, by order entered April 16, 1981, appointed a commission of three persons to decide the issues of compensation to be paid petitioner for the 10.64 acres condemned in fee, the 5.07 acres over which a flood easement was imposed, and damages, if any, to petitioner's remaining land. The District Court charged the commissioners on May 20, 1981. Petitioner took no exception to these charges. The commission heard evidence on September 8 and 9, 1981.

At this hearing, R.E. Moss testified that he appraised petitioner's property on behalf of respondent. Moss testified that he was aware at the time of the appraisal of changes not then reflected on the survey map, and he explained that he took these into account in making his appraisal.

The commission reported its findings on January 13, 1982, awarding petitioner $14,350. *See* Appendix U. On September 17, 1982, the District Court adopted these findings and entered a judgment in the amount of $14,350. After the District Court denied petitioner's "petition for rehearing", petitioner filed a timely appeal to the Eleventh Circuit.

By judgment entered October 5, 1983, the Eleventh Circuit affirmed in part and reversed in part. As the Court's July 11, 1983 opinion reflects, the Court affirmed on all issues except for the treatment of riparian rights and the issue of the acreage condemned. *See* Appendix R, reported at 709 F.2d 666. Specifically, with regard to riparian rights, the Court remanded for a determination of whether the commissioners had included the value of riparian rights in the land taken. *See* 709 F.2d at 667-68. With regard to the acreage surveyed for timber by the expert witness on which the commission relied, the Court of Appeals remanded to determine whether alleged errors in respondent's survey map affected the number of acres of timber for which compensation was due. *Id.* at 669. Also with respect to the issue of acreage condemned, the Court directed that a determination be made concerning petitioner's contention that an island outside the area condemned was actually part of an isthmus that had been

"pressed down" below the contour line forming petitioner's boundary line.

On November 8, 1983, petitioner filed a Motion for New Judge and New Commission, raising, for the first time, the issue of bias and "carelessness" on the part of the judge and the commission. Appendix Q. The District Court denied the motion by order entered April 18, 1984, and, by order entered May 14, 1984, denied petitioner's motion for leave to file an interlocutory appeal. Appendix P.

The commissioners heard testimony on the remanded issues on August 7, 1984. At the hearing, the commission specifically questioned R. E. Moss about the remanded issues of riparian rights and acreage condemned. Mr. Moss testified that his original estimate had included the full value of riparian rights in the land taken, and that no offset against the value of the taking was made for enhancement to the remaining property's value. Appendix V at A102. On the "pressed down" land issue, respondent's project forester, Billy Fred McCullough, testified that in 1962 he painted blazes marking the 790 contour that separated petitioner's property from respondent's. McCullough recalled seeing no isthmus at that time, and offered the opinion that he doubted that an isthmus would have been pressed down in the fashion petitioner claims it was. Respondent introduced a 1967 contract selling timber from the area to a lumber company. The contract reflected no isthmus at the 790 contour in the location. Petitioner's expert, Horace Ray Edwards, testified concerning a prior isthmus, but admitted that he did not survey the area and did not see the red blazes that had marked the 790 con-

tour for a number of years in the area of the alleged isthmus. As to how many acres of timber had been included in respondent's appraisal testimony, the commission also had before it the uncontradicted testimony of R. E. Moss that he was aware of property line changes not shown on the survey map when he guided the timber appraiser through the petitioner's property. *See* Appendix V at A116-18. John White, who cruised petitioner's property for timber, testified that he was guided by R. E. Moss to petitioner's property, and was told what property belonged to petitioner and what did not. Appendix V at A119-20, A131-35.

On September 26, 1984, the commission entered its Report. Appendix N. In this Report, the commissioners determined that compensation for riparian rights taken had been included in their original award, and that enhancement to the remaining property had not been charged as a setoff. They also concluded that petitioner had failed to prove he had ever owned land that subsequently had been pressed down below the 790 contour. The commissioners concluded further that petitioner had failed to prove entitlement to an additional award of land based on the maps because the appraiser had not been misled by any map error, but had in fact appraised the entire tract in issue. However, the commissioners awarded petitioner an additional $2,653.83 because two of the three believed that "enough doubt exists from the evidence that an additional award of $2,653.83 is due the defendant for timber which probably was not included in the previous award." *Id.* The third commissioner dissented from this additional award on grounds that a preponderance of the evidence indicated that all timber had been included in the original

award, observing that Mr. White's appraisal compared favorably with the timber appraisal of petitioner's expert, James L. Morris. *Id.*

Respondent took exception to the additional award, *see* Appendix K, and, by order entered January 15, 1985, Appendix J, the District Court accepted the commission's findings on all points except the additional compensation. On that point, the District Court reversed, because the commission majority had applied a "beyond a reasonable doubt" standard to the question of the acreage included in the timber appraised and that application of the proper standard, the "preponderance" standard, warranted no additional award. Appendix J at A27-29.

Petitioner again appealed to the Eleventh Circuit. By judgment entered May 30, 1986, the Eleventh Circuit affirmed on all issues without published opinion. Appendix H. Petitioner's petition for rehearing was denied by order entered July 29, 1986. Appendix F. Petitioner subsequently filed this Petition.

———o———

REASONS FOR NOT GRANTING PETITION

1. Petitioner Presents No Issue Of Federal Law, But Seeks Only To Retry The Facts

Petitioner raises no legal issues in his petition. Rather, by distorting the Eleventh Circuit's first opinion and misrepresenting the facts, he seeks to create an issue of federal law where there is none. Petitioner simply wants this Court to retry his case.

Petitioner first seeks retrial of the riparian rights issue. Petitioner asserts that the District Court erred on remand because the Eleventh Circuit's "reversal did not want to know if Commission considered the value [of riparian rights] . . . but instead it wanted riparian rights disclosed and added." Petition at 16-17. This is incorrect. The Eleventh Circuit remanded on the riparian rights issue to determine whether the commission had included the value of riparian rights in the land taken in its award,[3] and the Commission followed these orders to the letter:

> After hearing the arguments of [petitioner], the Commission requested that Mr. Bob Moss, appraiser for Alabama Power Company, to answer the question whether his appraisal testimony in the previous hearings had given consideration to the property having riparian rights . . . Based on our questions to Mr. Moss and his answer that riparian rights were consid-

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[3]The reasons for remanding the riparian rights issue are clearly set forth:

> Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. Appellee responds that "[t]he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission . . . and the District Court . . . found enhancement to the remainder as a result of the reservoir." The Commission mentioned appellant's claim as to riparian rights, but made no finding. The district court assumed the riparian rights "must have been" considered in assessing the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellees, however, this assumption was error.

Alabama Power Co. v. 1354.02 Acres of Land, 709 F.2d 666, 668 (11th Cir. 1983).

> ered in his testimony of value . . ., which was consistent with our understanding at the previous trial, . . . our previous findings included the value of riparian rights as a part of the value of the land taken.

Report of Commissioners on Order of Remand, Appendix N at A45. In petitioner's words, riparian rights were "disclosed and added." Petition at 16-17. The District Court found this testimony to support the Commission's finding, Opinion of January 15, 1985, Appendix J, at A22, and the Eleventh Circuit affirmed this finding as not clearly erroneous.[4] Appendix H. Petitioner offers no evidence that would support a contrary finding. Petitioner may not retry this fact issue here.[5]

Petitioner also challenges findings of fact regarding the acreage condemned.[6] He contends that he was not compensated for the correct acreage because an isthmus he owned was "pressed down" below the 790 contour forming his boundary, and because certain survey maps erroneously omitted a portion of his land. The commission rejected petitioner's first contention because it credited the McCullough testimony and a 1967 construction contract

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[4]The District Court rejected petitioner's further contention that the Commission misrepresented Moss's testimony, and the Eleventh Circuit affirmed. Again, petitioner offers allegations contrary to the evidence.

[5]Petitioner nowhere challenges the Eleventh Circuit's further determination that, "[a]s a matter of law, the award of just compensation is not required to include a separate item for riparian rights if, as here, such rights are taken into account with other elements making up the fair market value of the property taken." Appendix H at A12.

[6]Petitioner contends that the mere fact that there was an omission from the map warrants judgment in his favor. *See* Petition at 23-25. Obviously, this is incorrect if, as uncontradicted evidence shows, the map did not affect the survey.

showing that the "isthmus" did not exist and that the area in dispute was an island which had belonged to respondent for over fifty years before respondent instituted this action, and discredited petitioner's witness's testimony because he did not actually survey the premises, and did not offer any other evidence of the isthmus's existence. Report of Commissioners on Order of Remand, Appendix N, at A46-49. The District Court concluded that this finding was not clearly erroneous and the Eleventh Circuit affirmed. The commission rejected petitioner's second contention because of uncontradicted testimony that the appraisers were aware of changes not shown on the maps prior to the appraisal, and that, therefore, any error in the survey map did not affect the appraisal figure. The commission nevertheless awarded $2,653.83 because two of the three commissioners felt that a doubt existed as to whether all the timber taken had been counted. Report of Commissioners on Order of Remand, Appendix N at A53. The District Court properly rejected the award on grounds that the commission's finding applied a "reasonable doubt" standard rather than the correct "preponderance" standard. Appendix J at A27. The Eleventh Circuit affirmed. Petitioner nowhere contends that the courts below should have applied the "beyond a reasonable doubt" standard; again, he seeks merely to retry the facts.

2. Legal Issues Presented By Petitioner Are A Subterfuge For His Effort To Retry Fact Issues

Petitioner's remaining claims also are a subterfuge for his effort to retry facts. First, petitioner contends that the Eleventh Circuit failed to address all issues in its opinion on appeal after remand. Second, petitioner asserts

that the district judge was biased. Finally, he claims the District Court did not give proper instruction. None of these claims has merit.

The Eleventh Circuit was under no obligation to address in its opinion all issues presented on appeal. The Eleventh Circuit's *judgment* affirmed on all issues after all were briefed fully by the parties. "The *judgment* of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction." *United States v. Hark*, 320 U.S. 531, 534 (1944) (Emphasis added). Courts of Appeals can and do regularly dispose of appeals summarily without published opinion,[7] as did the Eleventh Circuit here. The fact that issues were not discussed does not

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[7]*See, e.g., Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162-63 and n.9 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969); *see also, Bryson & Co. v. Lilly & Co.*, 502 F.2d 1045 (5th Cir. 1974); *Magnesium Casting v. Hoban*, 401 F.2d 516 (1st Cir.), *cert. denied*, 393 U.S. 1065 (1969); *see generally, United States v. Johnson*, 327 U.S. 106, 113 (1946). Indeed due process requires only sufficient notice and the right to be heard, *see, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981), and due process requires no appeal at all after a full and fair trial, *see, Lindsey v. Normet*, 405 U.S. 56 (1972). As petitioner offers no basis for finding that he did not receive notice and a full and fair trial (and as the record clearly reflects that he did), petitioner cannot argue that the Eleventh Circuit's opinion's failure to discuss every contention made on appeal constituted a denial of due process. Nor can petitioner rely upon the dissenting panel member's opinion. *See* Petition at 21. The dissenting judge does not contend that the panel did not consider all issues, but simply that the District Court and the commission did not require *respondent* to explain the uncertain issues remanded. This ignores the plain language of the remanding opinion, which makes clear that it was *petitioner's* burden, not respondent's, to establish entitlement to additional compensation. *See* 709 F.2d at 669; *see also, Wilson v. United States*, 350 F.2d 901, 908 (10th Cir. 1965) (in decisions on which petitioner relies, the court makes clear that *landowner* has burden of proving inadequacy of compensation).

mean that they were not considered; it means simply that their disposition was so apparent as to require no further discussion. Thus, plaintiff does not raise a cognizable federal issue of law when he claims denial of due process and just compensation simply because the Eleventh Circuit did not recant all of his claims in its second opinion.

Petitioner's belated claim of judicial bias is without foundation either in law or fact. Two federal statutes govern judicial disqualification.[8] Petitioner's conclusory allegations, however, do not satisfy the standards set forth by either provision. *See Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913). Petitioner's only clearly articulated basis for recusal is that the District Court made rulings that were adverse to him. *See* Appendix Q. That is no basis for recusal. As this Court observed in *American Steel Barrel Co.*, "[i]t was never intended to enable a discontented litigant to oust a judge because of adverse rulings made. . . ." *Id.* The Eleventh Circuit affirmed the District Court's rejection of this claim; that decision does not warrant this Court's attention.

Petitioner's contention that the District Court did not follow the Eleventh Circuit's instructions on remand likewise is meritless. The Eleventh Circuit Court of Appeals reversed the District Court's earlier opinion with instructions that the District Court should clarify three matters not readily apparent from the record then before the Court of Appeals. Specifically, the Court of Appeals ordered the District Court to "insure that Appellant is compensated for the value of these [riparian] rights taken." *Ala-*

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[8]See 28 U.S.C. §§ 144, 455. Appendices D and E.

bama Power Company v. 1354.02 Acres of Land, 709 F.2d 666, 668 (11th Cir. 1983). The Eleventh Circuit also held that it was unclear from the record whether Appellant was entitled to additional compensation for the pressed down isthmus and whether respondent had appraised and cruised sufficient acres in light of the defect in respondent's survey maps. The Court of Appeals affirmed all other findings of the District Court. *Id.* at 667. Consequently, the District Court only had jurisdiction to consider the three matters upon which the Court of Appeals based its reversal. *See United States v. 125.07 Acres of Land*, 707 F.2d 11, 13 (1st Cir. 1983); *Henderson v. United States Fidelity and Guaranty Company*, 695 F.2d 109, 112 (5th Cir. 1983).

Pursuant to this mandate, the District Court remanded this matter to the commission for additional testimony on the three points raised by the Court of Appeals. Specifically, the District Court ordered the commission to consider testimony on the following points:

> I. In assessing total value of land taken, did you consider the value, if any, of riparian rights?
>
> If your answer is "No", please take into consideration such value and report the gross total value of land taken to the Court. In doing so, you must not offset enhancement to the remaining property against the value of riparian rights, but you may consider it to offset damages if any, to the remaining land. For instance, it may be considered to offset damages for interference with rights to water livestock running on the remaining lands.
>
> II. In assessing the total value of land taken, did you consider and include in your evaluation of

land taken whether or not any additional amount of land had eroded or been pressed down to below the contour line at which Defendant Perry's property commences?

If your answer is "No", please include in your report the value of any such additional land, if any.

III. It is further ORDERED that the Commission provide Robert A. Perry another opportunity at another hearing to prove that the condemnor's appraisers appraised acreage less than that actually at issue. If the Commission's report was based on any such error, the Commission is ORDERED to make a new report evaluating all land at issue or reporting that the former report considered such issues.

IV. The Commission may consider evidence offered as to these issues only and shall not consider further evidence of the value of minerals or other issues not herein enumerated.

Appendix O at A54-55.

A reading of this Order of Remand establishes that on remand the District Court fully and faithfully complied with the mandate of the Court of Appeals. As can be seen, the District Court remanded to the commission on instructions that mirrored the Eleventh Circuit's remand order. *See* Appendix R. The commission held hearings which "provide[d] appellant [Perry] the opportunity to prove that Alabama Power Company appraised and cruised insufficient acres." 709 F.2d at 669. The commission took evidence, and through its findings, made, to the Eleventh Circuit's satisfaction, "whatever adjustments [that were] thereby required." *Id.* Even if the District Court had erred in its instructions, however, the error was harmless because the commission clearly followed the

Eleventh Circuit's mandate. Consequently, Appellant's contentions that these instructions on remand are erroneous are wholly without merit.

3. Granting The Writ Would Not Enable This Court To Resolve Any Conflicting Decisions.

Finally, it is important to note what this petition does NOT involve. Petitioner nowhere shows that the Eleventh Circuit's decision conflicts with those of this Court, with those of other circuits nor with those of any state court. He makes conclusory allegations to this effect but, again, he demonstrates no actual conflict. The federal decisions he cites apply precisely the same standards as were applied by the District Court and the Eleventh Circuit below.[9] His contention that the Eleventh Circuit's decision

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[9]*Compare* Appendix J (District Court Opinion) *with,* in order cited by petitioner, *United States v. Merz,* 376 U.S. 192 (1964) (merely sets forth standards for district court's instructions to commission and for commission's report); *United States v. 90.39 Acres of Land,* 413 F. Supp. 91 (S.D. Iowa 1976) (rejects commission report under *Merz* because report made no allowance for severance damages; severance damages, however, are not in issue in the present case, and the commission's report on remand plainly discusses all issues); *Wilson v. United States,* 350 F.2d 901 (10th Cir. 1965) (court rejects landowner's challenge much like Perry's here because commission chose one of two sides of conflicting evidence); *United States v. 125.07 Acres of Land,* 667 F.2d 243 (1st Cir. 1981), *appeal after remand,* 707 F.2d 11 (1st Cir. 1983) (court reject landowner's challenge to award amount, reasoning that award there, as in Perry's case here, fell within the range of expert testimony; vacated and remanded for determination of state law issue of whether road was "public way", but, as in Perry's case here, court on second appeal affirmed finding against landowner because landowner had burden and failed to support his position. *See* 707 F.2d 11, 14-15); *United States v. 881.39 Acres of Land,* 254 F. Supp. 294 (E.D. Okla. 1966) (court rejects landowner's challenge to preparation and content of commission report).

denying him a jury trial conflicts with Alabama Supreme Court decisions likewise is without merit.[10]

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CONCLUSION

Respondent respectfully requests that petitioner's petition be denied.

/s/ EDWARD S. ALLEN
Attorney of Record for Respondent
Alabama Power Company

OF COUNSEL:

EDWARD S. ALLEN
JOHN J. COLEMAN, III
BALCH & BINGHAM
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(205) 251-8100

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[10]To begin with, the contention is not properly before this Court because petitioner's demand was untimely, and in any event, the Eleventh Circuit ruled on the issue in its July 11, 1983, decision, of which petitioner did not seek this Court's review. Even were this not so, however, the Alabama decisions on which petitioner relies do not involve condemnations under 16 U.S.C. § 814 and do not concern proceedings governed by the Federal Rules of Civil Procedure. *See Alabama Power Company v. Thompson*, 250 Ala. 7, 32 So.2d 795 (1947); *Mobile & Birmingham R. Co. v. L & N R. Co.*, 192 Ala. 136, 68 So. 905 (1915).

APPENDIX A

CITIZENSHIP Amend. 14

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Amend. 5 CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

16 U.S.C. § 814

§ 814. Exercise by licensee of power of eminent domain

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

APPENDIX D

28 U.S.C. § 144

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

APPENDIX E

28 U.S.C. § 455

§ 455. Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his oponion, for him to sit on the trial, apeal, or other proceeding therein.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7146

ALABAMA POWER COMPANY,

Plaintiff-Appellee.

versus

1354.02 ACRES, MORE OR LESS,
OF LAND IN RANDOLPH COUNTY,
ALABAMA and GLADYS GRAVES,
et al,

Defendants,

ROBERT A. PERRY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

(Filed July 29, 1986)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 30, 11 Cir., 1986, — F.2d —).
(JULY 29, 1986)

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

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* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

REHG-6 (Rev. 6/82)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7146

D.C. Docket No. 78-213

ALABAMA POWER COMPANY,
Plaintiff-Appellee,

versus

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, AND GLADYS GRAVES, ET AL.,
Defendants,

ROBERT S. PERRY,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

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* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

HATCHETT, Circuit Judge, dissented and filed an opinion.

Entered: May 30, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: AUG 8 1986

APPENDIX H

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7146

ALABAMA POWER COMPANY,
Plaintiff-Appellee,

versus

1354.02 ACRES, MORE OR LESS, OF
LAND IN RANDOLPH COUNTY, ALABAMA,
and GLADYS GRAVES, et al,
Defendants,

ROBERT A. PERRY,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama
(May 30, 1986)

Before RONEY and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM:

The appeal in this condemnation suit simply questions whether there is sufficient evidence to support the district court's determination that appellant property owner was adequately compensated for riparian rights and timber on the condemned land. We affirm.

This is the second time this case has been before this Court. On November 14, 1978, Alabama Power Company filed a condemnation complaint in the United States Dis-

* Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

trict Court for the Middle District of Alabama. The district court appointed commissioners to determine compensation due the affected owners. The commissioners determined that appellant, Perry, was due $14,350. Perry took exception to the commissioners' determination.

The district court, in a memorandum opinion and order dated September 17, 1982, affirmed the commissioners' compensation award. On appeal, this Court affirmed in part, reversed in part, and remanded for a determination of whether Perry had been adequately compensated for riparian rights and whether the Power Company had cruised the correct acreage of timber. *Alabama Power Company v. 1354.02 Acres of Land*, 709 F.2d 666 (11th Cir. 1983).

Pursuant to this Court's order, the district court reconvened the commissioners. They determined that while Perry had been adequately compensated for riparian rights, he had been inadequately compensated for his timber. Therefore, the commissioners made an additional award. The district court adopted the commissioners' determination on the issue of riparian rights, but reversed the commissioners' determination that Perry had not been adequately compensated for his timber.

The first question is whether the district court's finding that Perry was justly compensated for riparian rights is clearly erroneous. In our earlier decision, this Court noted that the district court assumed that Perry "must have been paid" for riparian rights because the commissioners mentioned Perry's claim to such rights. The commissioners, however, made no express finding as to compensation for riparian rights. We remanded for a clear

determination on the issue. In their second report, the commissioners stated they had considered "all elements of the value of the land taken in the first hearing, including any riparian rights." The appraiser for Alabama Power Company, Mr. R. E. Moss, testified that he had considered the riparian rights in valuing Perry's property. The district court then determined that the great weight of the evidence supported the conclusion that the amount previously awarded compensated Perry for riparian rights. The conclusion is not clearly erroneous. As a matter of law, an award of just compensation is not required to include a separate item for riparian rights if, as here, such rights are taken into account with other elements making up the fair market value of the property taken.

Second, Perry contends he was not compensated for the correct acreage of timber on his property. This issue arose out of map revisions dated in August 1978, reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The Power Company's cruise of the timber, however, was made on July 25 and 26, 1978. Perry alleges that because the appraiser did not have the revised August maps when the cruise was made in July, the cruise of the area must have been incomplete.

The commissioners found that Perry was due additional compensation, but the district court overturned this award. The district court held the commissioners applied incorrect legal standards as to the burden of proof. The district court correctly held that the landowner bears the burden of proving his damages and the compensation to which he is entitled by a preponderance of the evidence.

E.g., United States v. Smith, 355 F.2d 807, 809 (5th Cir. 1966); *United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama,* 214 F.Supp. 148, 150-51 (M.D. Ala. 1963). Applying the correct standard, the district court held that Perry failed to carry his burden on the timber argument. Perry's evidence consisted solely of the fact that the map had not been revised as of the date of the Power Company's cruise. The Power Company's appraiser, however, testified that he was aware of the incorrectness of the map and conveyed this knowledge to the timber cruiser, and as a result, the appraisal included the area in dispute. This testimony, the district court noted, is supported by a comparison among the "per acre" timber values produced by the original commissioners' report and the cruise performed by Mr. Perry's expert. The district court's finding upon which it based a modification of the commissioners' determination was not clearly erroneous.

AFFIRMED.

HATCHETT, Circuit Judge, dissenting:

In the previous opinion in this case, we held:

> An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the Federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for riparian rights in the relevant condemned area. Appellant apparently introduced that statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took riparian values into account in assessing the total land value.

> This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

709 F.2d 668. In spite of these clear directions, Alabama Power Company has failed to disclose and the district court has failed to make findings regarding the value to be assigned riparian rights.

Although nothing in the record has changed, the majority here dismisses the riparian rights claim by stating: "The great weight of the evidence supported the conclusion that the amount previously awarded compensated Perry for his riparian rights." Slip Op. at —. As a practical matter, our remand afforded this appellant no hearing on the issue framed by his appeal, no explanations as to why the issue is not addressed as directed, and no relief.

I would again remand the case to the district court with instructions to have Alabama Power Company disclose and the district court make a finding of the value assigned to riparian rights.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY
a corporation

Plaintiff

vs. CIVIL ACTION NO. 78-213-E

1354.02 Acres. etc., et. al.

Defendant

PETITION FOR REHEARING

(Filed January 29, 1985)
(Motion Denied January 30, 1985)

There was not adequate time allowed by District Judge for hearing objections to finding of the Commission and the petition for review.

Findings of this Court are based on so called facts from Mr. Moss and Mr. White after according to the record, they appear to have made false and contradictory statements under oath.

Findings of this Court are based on speculative and assumptive statements after Mr. White stated that he remembered nothing rather than use more factual testimony from the first hearing which were obviously more correct. Those first answeres [sic] were direct answeres [sic] to direct questions and plainly show that White did not cruise all of the Perry land.

Facts show that riparian rights were not paid for. There is no value given.

Facts show that not all of Perry timber cruised and not paid for.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc., et al.,

Defendants.

JUDGMENT
(Filed January 15, 1985)

In accordance with the opinion entered in the above-styled cause on this date and in accordance with the Report of the Commissioners filed September 26, 1984 as modified by such opinion, it is

ORDERED, ADJUDGED and DECREED by this Court that Robert A. Perry and wife, Sarah K. Perry, as owners of interests in the property taken, have and recover of the plaintiff the sum of $14,350.00, together with the interest thereon from the date of the plaintiff's entry into possession of the property until the date of this judgment, as just compensation for the taking of the property involved here.

DONE this the 15th day of January, 1985.

/s/ R. E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc., et al.,

Defendants.

OPINION

(Filed January 15, 1985)

Pursuant to an order of remand from the Eleventh Circuit Court of Appeals dated July 11, 1983, reported as *Alabama Power Company v. 1354.02 Acres of Land*, 709 F.2d 666 (11th Cir. 1983), this Court referred the ascertainment of just compensation to the commission for further proceedings on several points. The matter is now before this Court on objections by both the plaintiff and the defendants to the Commission's report on the order of remand.

Although the facts are set forth in the Commission's first report and this Court's opinion affirming that report, it is appropriate to briefly outline the aspects of the case relevant to the present proceedings.

On November 14, 1978, Alabama Power Company filed suit in this Court for the condemnation of various tracts of land for its proposed Harris Reservoir. This Court appointed commissioners for a determination of the compensation due the landowners. The commissioners assessed the compensation due at $14,350.00. This Court

subsequently entered an order confirming the commission's report, and the defendant appealed. Although the appeal raised a number of issues, the Court of Appeals found merit in only three of the defendant's points and remanded the case to the District Court for further proceedings on those issues. Consistent with that order of remand, this Court remanded the cause to the Commission for consideration of the following:

> 1. In assessing the total value of the land taken, did you consider the value, if any, of riparian rights?
>
> If your answer is "no", please take into consideration such value and report the gross total value of the land taken to the Court. In doing so, you must not offset enhancement to the remaining property against the value of riparian rights, but you may consider it to offset damages, if any, to the remaining land. For instance, it may be considered to offset damages for interference with rights to water livestock running on the remaining lands.
>
> 2. In assessing the total value of the land taken, did you consider and include in your evaluation of land taken whether or not any additional amount of land had eroded or been pressed down below the contour line at which defendant Perry's property commences?
>
> If your answer is "no", please include in your report the value of any such additional land, if any.
>
> 3. Did the condemnor's appraisers appraise acreage less than that actually at issue?
>
> If your answer is "no", please include in your report the value of any such additional land, if any.

Pursuant to the Court's order, the Commission reconvened in Opelika, Alabama on the 7th day of August, 1984. The Commission announced an affirmative response

to the first question certified by the District Court, and the parties were allowed to offer evidence as to the second and third questions. On September 26, 1984, the Commission filed its report, as to which both parties filed written objections. These objections were heard by this Court on January 2, 1985.

This Court has reviewed the transcripts of the proceedings before the Commission and heard oral argument by the parties with respect to their objections to the Commission's report. In considering the objections, it is necessary to review the legal standards governing review of the report of the Commissioners.

Fed. R. Civ. P. 71A(h) provides that "if a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53." Fed. R. Civ. P. 53(e)(2) further provides that:

> In an action to be tried without a jury, the court shall accept the master's finding of fact unless clearly erroneous. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Thus, this Court may set aside a finding of fact by the commission if that finding is "clearly er[r]oneous". *United States v. Merz*, 376 U.S. 192, 198 (1964); *United States*

v. Certain Lands in the City of Statesboro, 341 F.2d 742, 744 (5th Cir. 1965). As noted by the former Fifth Circuit Court of Appeals, "Under the clearly erroneous concept, a finding is to be set aside when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Certain Lands in the City of Statesboro*, 341 F.2d 742, 744 (5th Cir. 1965); *see also United States v. Waymire*, 202 F.2d 550, 553 (10th Cir. 1953). If the District Court determines that the commission's findings were in fact clearly erroneous, Fed. R. Civ. P. 53(e)(2) outlines the options available to correct those findings. Specifically, "it may modify the report on the basis of the record made before the commissioners, or it may reject it in whole or in part or may receive further evidence or may recommit it with instructions". *United States v. Merz*, 376 U.S. 192, 199-200 (1964); *United States v. Hilliard*, 412 F.2d 174, 177 (8th Cir. 1969). Applying this concept, the Fifth Circuit Court of Appeals has stated that:

> We do not think the power to modify is to be narrowly construed or applied. The power to modify is a power to alter or change, and to enlarge and add as well as to limit, restrict or reduce. The District Court could have rejected the commission's findings had they been clearly erroneous. Had this been done, the District Court could have substituted its own findings based upon the evidence before the commission.

United States v. Tampa Bay Garden Apartments, Inc., 294 F.2d 598, 603 (5th Cir. 1961). In determining whether or to what extent a report should be modified, the District Court may refer to the transcripts and records com-

piled by the commission without the necessity of a de novo hearing or similar compilation of additional evidence. *Merz*, 376 U.S. at 200; *United States v. 1,162.65 Acres of Land*, 498 F.2d 1298, 1302 (8th Cir. 1974); *Tampa Bay Garden Apartments, Inc.*, 294 F.2d at 603.

The principles outlined above have no application, however, in the context of a court's review of a commission's application of the law to the facts. Thus, where a commission applies an incorrect legal standard, its findings are not protected by the "clearly erroneous" standard applicable to findings of fact. *Fogel v. Chestnut*, 668 F.2d 100, 116-17 (2nd Cir. 1981); *United States v. 620.98 Acres of Land*, 255 F. Supp. 427, 431 (D. C. Ark. 1966); *See, Generally*, 5A J. Moore, *Moore's Federal Practice* ¶ 53.12 [Second Edition 1984]; 9 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2614 (1971). As noted by one commentator, "the master's conclusions of law . . . carry no weight with the court." 9 Wright and Miller, *supra*, at § 2614.

Guided by these principles, this Court makes the following findings with regard to the questions certified to the Commission:

I. *Riparian Rights.* In its first opinion, this Court stated that whatever loss the claimant may have suffered with regard to riparian rights was not independent of the value of the land, and therefore must have been considered by the commissioners in their appraisal of the land. The Eleventh Circuit Court of Appeals found fault in this view and remanded consideration of that issue to this Court. This Court in turn certified the question of riparian rights to the Commission. In its Report On Order of

Remand, the Commission confirmed that it had considered all of the elements of the value of the land taken in the first hearing, including any riparian rights. Further, the Commission requested the appraiser for Alabama Power Company, Mr. Moss, to state whether his earlier testimony on the value of the land taken had considered riparian rights. Mr. Moss testified that he had considered the riparian rights in valuing the property to be taken. Consequently, the Commission unanimously concluded that its previous valuation of the condemned property included consideration of the value of the riparian rights associated therewith. Upon review of the transcripts of both hearings, this Court finds nothing in the record to indicate that the Commissioners' finding is clearly erroneous. To the contrary, this Court believes that the great weight of the evidence supports the conclusion that the Commission considered the value of riparian rights in its earlier findings.

II. *Change of Contours.*

The Court of Appeals also remanded for consideration of a contention by the defendant that a portion of the property had been pressed down below the 790 contour line, so that more property was taken than was described in the complaint. The Commission did not address this issue in its first report. At the August 7, 1984 hearing, however, the Commission allowed the parties to offer evidence bearing on this question.

The property in issue is an island formed by the 790 foot contour that Mr. Perry contends had once been connected to the land described in the complaint by a 180-foot isthmus. Mr. Perry testified that his family had exer-

cised ownership over this parcel of property and that from time to time he had removed storm damaged timber from it. He contended that the elevation of the isthmus had been lowered below the 790 contour by logging operations and other activities, which in turn separated the island from the rest of his property because the property line is the 790 contour at this location.

Mr. Perry's surveyor testified that, according to a survey done by him on October 10, 1983, the 790 contour surrounded the island as shown on a survey drawing which was received as evidence. He also stated that he had observed blazes on the trees surrounding the island as well as along the 790 contour on the main body of the Perry land on a visit to the property in 1976. He expressed the opinion that in 1976 the 790 contour extended to form a strip connecting the island to the Perry property described in the complaint. However, during the 1976 visit the witness testified that he had observed no blazes along the claimed isthmus leading from the main body of land to the island. Moreover, he admitted on cross-examination that his belief as to the location in 1976 of the 790 foot elevation between the Perry land and the island was formed without having done a survey of the 790 elevation.

Plaintiff called as a witnesss Mr. Billy McCollough, a forester for Alabama Power Company, who testified that he was familiar with the area and had marked the 790 contour on this property on at least two prior occasions. Mr. McCollough testified that, to the best of his knowledge, there had never been an isthmus or land bridge between the main body of the Perry property and the island. Plaintiff also produced a 1967 contract for the sale of timber in this area, showing as Alabama Power Company land

the island and the so-called isthmus. Plaintiff also introduced its deed dated February 20, 1929, by which it had obtained title to all property below the 790 contour as well as islands created by the 790 contour.

Noting that Mr. Perry's theory that the contour had been lowered along a 186-foot strip was unlikely, the Commission concluded that he had failed to prove ownership of the area encompassing the island and the so-called isthmus. Consequently, the Commission determined there was no justification for any award to the defendant for that property.

This Court concludes that this finding by the Commission is well-supported by the evidence and is not clearly erroneous.

III. *Appraisal of Acreage Less Than That Actually At Issue.*

In its opinion remanding this matter for further consideration, the Eleventh Circuit Court of Appeals instructed this Court to provide Mr. Perry an opportunity to prove that the plaintiff cruised the timber on less than all of the condemned land. At the August 7, 1984 hearing, the Commission allowed both parties to offer evidence bearing on this question.

The controversy concerning this item arose out of map revisions dated in August, 1978, reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The plaintiff's cruise of the timber, however, was made on July 25 and 26, 1978. Mr. Perry contends that, without the benefit of

the revised maps, the plaintiff's cruise of the area must have been incomplete.

Mr. Moss, the Plaintiff's appraiser, stated that the property line issue was brought to his attention by Mr. Perry in 1976. The dispute was later resolved, and the plaintiff conceded that Mr. Perry had title to the additional property. Mr. Moss testified that although the maps had not been revised as of July 25 and 26, 1978, he was aware of the acreage change occasioned by the property line alteration at that time and that he informed the timber cruiser, Mr. John White, of the change. Mr. Moss also testified that he accompanied Mr. White to the tract and advised him as to the proper area to be cruised.

Mr. John White cruised the timber for Alabama Power Company in July of 1978. He had no specific recollection as to what he had cruised or whether Mr. Moss accompanied him to the property. However, he stated that his working map did not have the Perry property outlined and that, therefore, he had not located the land himself and Mr. Moss must have accompanied him. Both Mr. Moss and Mr. White testified to their routine practice during the summer and fall of 1978 as to review of each map revision to determine the need for changes in timber cruises and appraisals. No such changes were deemed necessary for this property.

On a per acre basis assuming a cruise of the entire 15.71 acres, Mr. White's assessment of the value of the timber compared favorably with a valuation of the timber per acre between elevations 793 and 800 by Mr. Morris, one of Mr. Perry's witnesses in the earlier hearing. The White cruise and the Morris cruise were the only evidence

of value by actual timber count. The Commission also received testimony that the additional land under consideration consisted of bluff land, pastureland, creekbed and timber production land.

In his closing argument, the defendant raised contentions as to measurements and estimations of the eastern boundary of the property by Mr. Ray Edwards, the surveyor who had testified earlier regarding the alleged isthmus in the western part. Mr. Edwards did not testify concerning these measurements. Similarly, although Mr. Perry contended that Mr. Edwards had made a sketch of the area, no sketch was introduced and Mr. Perry conceded that the sketch was not a survey of the area. No ties had been made to establish corners, and points of reference were elevations that were estimated because they were under water.

Based on this evidence, the Commission unanimously determined that the defendants were not entitled to an award for additional land on the eastern boundary not included within the plaintiff's original survey. This Court believes this conclusion is well supported by the evidence and not erroneous. Moreover, the point was not one of the subjects of the remand by the Court of Appeals.

With regard to the claim for additional compensation for timber not included within the previous award, the majority of the Commission awarded the claimant additional compensation, although one Commissioner dissented. Specifically, the majority found that "enough doubt exists from the evidence that an additional award of $2,653.83 is due the defendant for timber which probably was not included in the previous award." The third commissioner,

however, determined that the preponderance of the evidence indicated that all of the timber was included within the original award.

For the reasons outlined below, this Court is compelled to modify the Commission's finding on this item and to overturn the award of additional compensation for timber.

As noted above, the Commission's conclusions of law carry no weight with the District Court. *See Fogel v. Chestnut,* 668 F.2d 100, 116 (2nd Cir. 1981); *See generally* 5A J. Moore, *Moore's Federal Practice,* ¶ 53.12[5] (1984). On item III, two of the commissioners applied an incorrect legal standard both as to the burden of proof and the placement of that burden. Their finding was that "enough doubt exists from the evidence that an additional award . . . is due the defendant for timber. . . ." This represents a clear misapplication and misstatement of the correct legal standard with regard to the burden of proof. As this Court instructed the Commission, the landowner bears the burden of proving his damages and the compensation to which he is entitled by a preponderance of the evidence. *E.g., United States v. Smith,* 355 F.2d 807, 809 (5th Cir. 1966); *Morgan v. United States,* 356 F.2d 17, 20 (8th Cir. 1966); *United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama,* 214 F. Supp. 148, 150-51 (M. D. Ala. 1963). On Item No. III, however, the majority of the Commission employed a standard of reasonable doubt rather than the required preponderance standard. Moreover, the standard employed by the majority apparently misplaced the burden of proof on this issue in requiring the *plaintiff* to erase any doubt that the additional timber was included in the previous award. The

dissenting Commissioner correctly imposed the burden of proof on the landowner and applied the proper preponderance standard. In light of this misapplication of the law to these facts, this Court is compelled to modify the Commission's findings. The Court concludes that Commissioner Pinkston applied the proper legal standard to the facts as recited in the Commission's Report and reached the correct result in this case.

Even if the majority of the commission had made the additional award for timber based on a preponderance of the evidence standard, this Court would conclude that its findings were clearly erroneous and thus subject to modification under Fed. R. Civ. P. 53(e)(2). As Commissioner Pinkston noted, "the preponderance of the evidence was to the effect that all of the timber was included in the original award." Mr. Perry's only evidence that Mr. White did not cruise all of the timber was that the map had not been revised as of the date of Mr. White's cruise. The plaintiff, however, produced persuasive evidence that Mr. White was aware of the correct area to be cruised at the time he appraised the timber and that he thus conducted a complete appraisal of the timber. This conclusion is supported by a comparison among the per acre timber values produced by the original commission report, Mr. White's cruise as attributed to the entire 15.71 acres and the cruise performed by Mr. Perry's expert, Mr. Morris. The great weight of the evidence leads to the conclusion that Mr. White included the value of the additional timber in his original cruise, and that the original commission report included compensation for all timber taken.

This Court is convinced that the majority of the Commission committed a mistake in awarding Mr. Perry ad-

ditional compensation for timber. As a result, this Court will modify the Commission's finding on Item No. III and overturn the Commission's award of additional compensation. Fed. R. Civ. P. 53(e)(2); *United States v. Merz*, 376 U.S. 192, 199-200 (1964); *United States v. Certain Lands in the City of Statesboro*, 341 F.2d 742, 744 (5th Cir. 1965).

Judgment will be entered in accordance with the Report of the Commissioners with regard to Item Nos. I and II as well as the question raised regarding the eastern boundary. With regard to Item No. III, the Court modifies the Commission's report to conform with this opinion. Consequently, this Court denies any additional compensation for timber condemned by the plaintiff.

Done this the 15th day of January, 1985.

/s/ R. E. Varner
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc., et al.,

Defendants.

OBJECTIONS TO REPORT OF COMMISSIONERS

(Filed October 15, 1984)

The plaintiff objects to that aspect of the report of the commission awarding an additional $2,653.83 for timber within the taking, on the following grounds:

1. The award was not based on the preponderance of the evidence, but rather on a finding of "sufficient doubt".

2. Although the commission was properly charged by the Court that their award should be based upon the preponderance of the evidence, only the dissenting member of the commission applied such a standard to the facts.

3. The commission erroneously applied a standard of judging the evidence which was not on the basis of determining the facts as established by the preponderance of the evidence.

4. There is no evidence in the record to support the award, in that neither the testimony of plaintiff's forestry

witness, Mr. White, nor the testimony of the defendant's forestry witness, Mr. Morris, supports the award.

5. The findings of the commission have no basis in the record.

/s/ Edward S. Allen
Attorney for Plaintiff

OF COUNSEL:

Balch, Bingham, Baker,
Hawthorne, Williams & Ward
P.O. Box 306
Birmingham, AL 35201

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading has been served upon the defendant by first-class United States mail properly addressed and postage prepaid on this the 12th day of October, 1984.

/s/ Edward S. Allen
Of Counsel

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

vs. CIVIL ACTION NO. 78-213-E

1354.02 Acres, etc., et al,

Defendant.

PETITION FOR REVIEW

Comes now the Defendant in the above-styled case and makes Petition for Review to the U.S. District Court for the Middle District of Alabama, Eastern Division and states:

1. Petitioner is owner in fee simple of the real estate described in the Complaint.

2. That Plaintiff, Alabama Power Company, instituted condemnation proceedings against Defendant's land.

3. That a Commission was appointed by the Court to determine the value and damages of Defendant lands taken and the Commission found in the amount of Seventeen Thousand Three and 83/100ths ($17,003.83) Dollars; Defendant seeks a review by this Court of the Commissioners award of damages.

4. In addition to the foregoing, the award of the Commissioners is indefinite in that the exact lands for which the award was made were improperly and indefi-

nitely described making it impossible for the award to be proper. Defendant owns lands taken physically by the Plaintiff but which lands have not been described in Plaintiff's petition for condemnation.

5. Defendant prays that Your Honor will grant all relief prayed for in the *Exceptions to Commissioners Report.*

6. Defendant prays that Your Honor will order that the District Clerk determine the cost for transcribing the record of the Commissioners hearing conducted in the case and advise the Defendant and Defendant will immediately tender the costs into Court. Defendant has tendered the sum of Two Hundred ($200) Dollars for costs with this petition, but does not know the amount of the costs and respectfully requests that Your Honor will set the same. Defendant requests an original transcript of the Commissioners hearing be provided this Court with a copy sent to the Defendant.

WHEREFORE, Petitioner prays for a review of the Commissioners award by *jury trial* for the purpose of ascertaining the just damages payable to the Defendant by reason of condemnation of Defendant's property and Defendant prays for all of the relief asked for in the Defendant's *Exceptions to Commissioners Report* filed along with this Petition for Review.

DEFENDANT MOVES FOR AN ORAL HEARING ON THIS PETITION.

/s/ Robert A. Perry
P. O. Box 343
Wedowee, AL 36278

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

DATED:

STATE OF ALABAMA
RANDOLPH COUNTY

The undersigned, Robert A. Perry, hereby verifies that the above statements are true and correct to the best of his knowledge and belief.

/s/ Robert A. Perry

Sworn to and Subscribed before me this 12th day of October, 1984.

/s/ Andrea W. Wright
Notary Public

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

DATED: This 12th day of October, 1984.

/s/ R. A. Perry

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

vs. CIVIL ACTION NO. 78-213-E

1354.02 acres, etc..; et al,

Defendants.

EXCEPTIONS TO COMMISSIONERS REPORT

Defendant excepts to Commissioners Report of appraisal herein on the following grounds:

1. No payment for riparian rights.

2. The reversal stated that if the maps were wrong at the time of appraisal, values would be wrong as well and maps at the time of appraisal did not include any riparian rights owned by Perry.

3. Findings not based on sufficient evidence.

4. Findings on riparian rights based on contradictory statements by witness.

5. Findings on riparian rights based on testimony that had already been determined by the Court of Appeals not to include payment for riparian rights.

6. Findings on riparian value based on testimony that specifically stated that the values included nothing for riparian rights.

7. Refusal of Commission to consider that at the time of appraisal, Alabama Power Company claimed ownership of riparian rights as proved by exhibit showing Alabama Power Company's claim of ownership and the erroneous deed whereby that ownership was acquired.

8. Commission's earlier findings, as well as the most recent, were in error due to erroneous charges by District Judge.

9. Court of Appeals concluded that anything not on the map at the time of appraisal was not appraised.

10. Commissioner's findings are in conflict with the findings of the Court of Appeals findings which had already determined that Alabama Power was assuming an erroneous principle that riparian rights were a damage rather than a taking.

11. Commissions report not proper according to Supreme Court guidelines.

12. Findings were based on bias and prejudice.

13. Findings were designed to justify previous actions by allowing witness to reverse his testimony.

14. Instruction was not adequate from Judge to Commission.

15. Commission refused to look at credibility of witness based on misrepresentation and contradiction of testimony.

16. The value of riparian rights or the basis for this value is not shown in report.

17. Conclusionary findings are not adequate.

18. The preponderance of evidence showed that riparian rights not paid for.

19. No payment for so-called pressed down land.

20. Commissions reasons for not paying for "pressed down" land leaves out important evidence presented by Defendant, evidence that may be verified yet and proves that Alabama Power Company has not exercised ownership over this land as asserted.

21. The deed to timber sold by Alabama Power Company does not include this land.

22. Commission did not attempt to verify truth of statements by Alabama Power Company which can easily be verified by the fact that this timber was not cut by anyone except Robert A. Perry and still stands today.

23. Commission continues to show bias and prejudice by not verifying the truthfulness of testimony or considering all testimony presented. Alabama Power Company presented no independent testimony, only testimony from employees with interest.

24. Robert A. Perry has exercised control and ownership for more than thirty years. Alabama Power Company has never exercised ownership.

25. Not adequate instruction from Judge or report.

26. No payment for land reported to have been appraised by Alabama Power Company in earlier hearing, but determined to have not been appraised by the Eleventh Circuit.

27. Refusal of Commission to consider the quality of the earlier appraisal when Eleventh Circuit had deter-

mined that if the maps were wrong at the time of appraisal (1976) value would also be wrong.

28. Refusal of Commission to consider improvements that were on area claimed to have been appraised but reversed by Eleventh Circuit.

29. Commission stated that they were not concerned with reversal only Judge Varner's charges.

30. Commission bases its opinion on testimony of a witness that was shown by exhibit to have been misrepresenting his appraisal. The appraisal date as testified to could not represent all of the land based on an offer in 1978 still claiming that Defendant did not own any land below the 790′ contour and showing the deed by which Alabama Power Company acquired the property.

31. Commission states that issue of ownership below 790′ contour was resolved but neglects to state that it was resolved more than two years after appraisal. Appraisal only considered property considered by Alabama Power Company to be owned by defendant at the time of appraisal (1976) and their maps of that date.

32. Commission based its opinion on statements by witness that he had been on property many times, but the facts remain that he said he appraised in 1976 and witness contradicted his own testimony several times. He could not verify that he had been on property as stated.

33. Statements by Commission that witness knew of the map errors at the time of appraisal, could not be true due to his own testimony that maps were only wrong in northern section away from taking.

34. Commission neglects to state that Alabama Power Company, by its actions, exhibit and statements, denied any belief of Defendant's claim to ownership until 1978, years after appraisal, and several months after timber cruised.

35. Commission puts all faith and credibility in contradictory statements by witness and readily allows him to change his testimony.

36. Timber testimony by Alabama Power Company was a rehash of principle already rejected by the Eleventh Circuit and Commission's decision was obviously based on this by not paying as prescribed by Eleventh Circuit.

37. Commission did not award enough for timber on land left off the 1976 to 1978 maps.

38. Commission based decision on testimony by witness who misrepresents pasture land [sic].

39. Commission did not follow guidelines by Eleventh Circuit for timber.

40. Commission could have easily verified the truthfulness of Defendant's testimony by personally looking at the shape of property left off maps but did not just as the issue of cutting timber could have resolved the pressed down issue.

41. Statements by Commission that property lines were resolved in 1976 is absolutely false.

42. Statements to the effect that Perry is misrepresenting the property is another case of predetermining of issue without use of available options, namely inspection.

43. The remaining severed land, as indicated by Alabama Power Company maps and the actual land is shaped differently, one more or less semi-circular, the other boot shaped. This could have been determined by inspection but is [sic] would have shown Perry right.

44. Eleventh Circuit had already determined timber amount to be wrong if maps were wrong at time of cruise.

45. Mr. White states that he could not have found property without being shown is a ridiculous statement for a forester to make considering he does surveying and works from maps daily. I have full confidence that Mr. White could locate any piece of property in the State of Alabama with no help if he is given the legal description and his maps.

46. Mr. Moss stated in former testimony that Mr. White's cruise consisted of only land on the maps (July, 1978 maps). Now he states that it includes other lands. This is a contradiction and is misrepresentation.

47. Bias and prejudice is the only way for witness to maintain credibility after repeated misrepresentation and contradictory testimony.

48. The Eleventh Circuit stated that Mr. Perry had the right to show that not all his property was appraised and that if the maps were wrong at the time of appraisal (1976) then the values were wrong as well. The maps were wrong but the Commission refused to hear evidence of the quality of appraisal from Mr. Perry and instead attempted to justify the Alabama Power Company appraisal by allowing Alabama Power Company witness to change his testimony and disregard the reversal and exhibits and testimony by Alabama Power Company.

49. The quality of the appraisal namely, truthfulness of the appraiser, were the main issues, but Court, by instruction and action, refused to consider the misrepresentations and contradictions.

50. Court refused to hear witnesses concerning the quality of the appraisal.

51. Instruction is inadequate and does not conform to the requirements by law, the Supreme Court guidelines and the Eleventh Circuit Court of Appeals.

52. The report of the Commission does not conform to guidelines from the Supreme Court.

53. Commission fails to consider property as a whole.

54. Commission fails to specify amount of compensation for riparian rights and basis for this determination in the evidence of testimony of the previous hearing.

55. Commission refused to hear Defendant's necessary testimony of facts relevant to the requirements of the Appellate Court.

56. Enhancement findings are based on false statements and property not comparable to Mr. Perry's land.

57. Comparable sales are not comparable to Perry's land.

58. Commission does not examine and report degree of comparability and indeed the fact of whether the comparable sales are comparable to Mr. Perry's property as required by Supreme Court guidelines.

59. Commission failed to consider the great weight of evidence which showed Mr. Perry not compensated adequately for property and damages by cutting it up.

60. The element of cattle farming and fences have not been considered as stated by the highest and best use of both Plaintiff and Defendant.

61. Any decision or opinion in this case should be set aside until the U. S. Attorney General or appropriate agency make an independent examination of the facts, documents, testimony, decisions and instructions in this case as presented by Plaintiff, its attorneys, witnesses and District Judge and determined by Commission and District Court. Determine if any law has been violated that would affect the determination of just compensation as required by the U.S. Constitution.

WHEREFORE, Defendant moves that:

(1) The report of the Commissioners be set aside:

(2) The Plaintiff be required to include all of Defendant's property which is in the taking area, to be described properly, and compensated for in the award:

(3) That the Trial Judge make an Order setting out the specific actions to be taken by the Commission so that the Appellate Court's ruling and orders will be compiled with.

(4) That a new Commission be appointed to hear the Defendant's case as the Commissioners presently appointed could not hear the case without being biased by the previous hearings and reports rendered;

(5) That Plaintiff be required to pay just compensation as required by the Constitution and law and that Defendant be compensated for all rights taken and for all property.

/s/ Robert A. Perry
P. O. Box 343
Wedowee, AL 36278

STATE OF ALABAMA
RANDOLPH COUNTY

The undersigned, Robert A. Perry, hereby verifies that the above statements are true and correct to the best of his knowledge and belief.

/s/ Robert A. Perry

Sworn to and subscribed before me this 12th day of October, 1984.

/s/ Andrea W. Wright
Notary Public

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

This 12th day of Oct., 1984.

/s/ R. A. Perry

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v.

CIVIL ACTION NO. 78-213-E

1354.02 ACRES, ETC., et al.,

Defendants.

REPORT OF COMMISSIONERS
ON ORDER OF REMAND

(Filed September 26, 1984)

In accordance with Order of Remand dated the 18th day of April, 1984, issued pursuant to the opinions and orders of the United States Court of Appeals for the Eleventh Circuit dated July 11, 1983, (709-F-2-D-66) and March 7, 1984, the Commission heretofore appointed by this Honorable Court met in Opelika, Alabama on the 7th day of August, 1984.

There were present, other than the Commissioners appointed, the Honorable Edward Allen and the Honorable Lewis Hamner, as counsel for Alabama Power Company and Mr. Robert A. Perry, the property owner, who represented himself. Testimony was taken and exhibits were offered into evidence with respect to the items specified in the Remand. Upon consideration of the Order of Remand and the evidence presented, the Commission makes this report.

ITEM I

RIPARIAN RIGHTS

Although the Commission in previous findings made no specific reference to riparian rights or any other component of value other than timber, the Commission did consider all elements of value of such land, including any riparian rights. All individual elements of value were considered as they contribute to the overall value of the land, and not as separate items.

In fixing the value of the taking, enhancement to the remainder as a result of the project was not offset by the Commission against any element of value of the part taken.

At the beginning of the August 7, 1984, hearing, Mr. Perry gave opening statements and referred to portions of the Perry transcript of the previous hearing. After hearing the arguments of Mr. Perry, the Commission requested Mr. Bob Moss, appraiser for Alabama Power Company, to answer the question whether his appraisal testimony in the previous hearings had given consideration to the property having riparian rights. His answer being in the affirmative, the Commission unanimously stated into the record the following:

> Based on our questions to Mr. Moss and his answer that riparian rights were considered in his testimony of value although not set out as a separate part of value, which was consistent with our understanding at the previous trial, we decline to hear any additional new testimony as to riparian rights and state for the record that our previous findings included the value of riparian rights as a part of the value of the land taken.

Mr. Perry raised objections to the Commission's findings, and these objections appear in the transcript of the hearing.

FINDINGS OF THE COMMISSION AS TO ITEM I

The Commission finds that riparian rights were considered in the hearing of September, 1981, and included in the award.

/s/ O. G. Pinkston
Commissioner

/s/ Joseph B. Turner
Commissioner

/s/ W. C. Lumpkin
Commissioner

ITEM II

CHANGE OF CONTOURS

Mr. Perry's opening statement was to the effect that his family had exercised ownership over this parcel of property, which is not shown in the plaintiff's maps or testimony as belonging to Mr. Perry, and that from time to time they had removed "storm damaged timber" from the property.

Mr. Perry called as an expert witness Mr. Ray Edwards, a surveyor and engineer, to introduce into evidence a survey shown as Defendants Exhibit 4, dated October 10, 1983, of the 790 elevation in the area under consideration. This survey shows an island formed by the 790 contour, 186 feet south of the Perry property as shown on the Alabama Power Company maps.

Mr. Edwards also gave testimony to the effect that he had visited the property in 1976 and that old blazes on

trees surrounding the island portion of the property were typical markers that represent property lines of the Alabama Power Company at the 790 contour. He also noted that the same type marks were seen north of the island along the larger body of the Perry property. Defendant's Exhibit 5 was introduced showing Mr. Edwards' recollection of the location of blazes seen in 1976.

No survey of the 790 elevation was done in 1976. Under cross-examination by Mr. Allen, Mr. Edwards testified that the dashed line on Defendant's Exhibit 5 was only his judgment, without having done a survey, of the location of the 790 elevation in 1976. Mr. Edwards also testified that in 1976 he saw no blazes along the claimed isthmus or "land bridge" leading from the main body to the secondary body or island. The dashed lines on this part of Exhibit 5 were his estimate of elevation 790 in 1976, but not based on a survey or where blazes were seen by him.

Mr. Perry claimed that during logging operations of timber in the area in previous years logging equipment had been utilized to drag the logs across the isthmus and had dug depressions which would have lowered the elevation below the 790 contour. It was also noted that this isthmus was approximately 186 feet long. Mr. Perry contended that the lowering of the elevation by the logging operations as well as from other means had separated the larger body from the smaller body. Also his statements were to the effect that fill had been taken from the isthmus in order to cover debris and stumps which were cleared when Harris Reservoir was under construction. This construction occurred after the filing of the complaint in 1978.

Mr. Billy McCollough of Dadeville, who is a forester for Alabama Power Company, testified that he had been familiar with the area for many years and that he had marked the 790 contour on the property on two occasions, the first being in 1962. Mr. McCollough testified that to the best of his knowledge there was no isthmus or land bridge which would exclude the parcel under consideration from Alabama Power Company ownership. He also stated that he had responsibility for the sale of timber in the area and had helped mark and made a sale of timber in 1967 to Bailey Brothers. Plaintiff's Exhibit 3, the contract for this sale of timber, was introduced as an exhibit with an attached map representing the area to be cut. This map showed that timber to be cut included the timber on the smalled body of land as well as the so-called isthmus leading to the primary area of land, thereby indicating Alabama Power Company ownership.

Plaintiff's Exhibit 2, the deed of acquisition by Alabama Power Company, states that islands created by raising water to the 790 contour, as well as lands lying below the 790 contour, were conveyed to Alabama Power Company in 1929.

No testimony was given as to the value of the parcel under consideration or the quantity or quality of timber on this secondary body. The Commission notes that although this item was discussed in the original hearing in September of 1981, no survey or evidence was introduced at that time and the only evidence produced by Mr. Perry at the current hearing was the testimony of Mr. Edwards and the survey dated October 10, 1983.

FINDINGS OF THE COMMISSION AS TO ITEM II

The evidence presented by the Power Company, its painting of the lines, cutting of timber by written contract and having title to islands as shown in the deed, was not disproved by Mr. Perry's testimony of historical claim of possession, cutting of storm damaged timber and Mr. Edward's survey or drawing "of where the approximate location of the 790 elevation appeared to be in 1976". The theory of the lowering of the contour along the entire 186 foot long isthmus appears unlikely. The burden of proof being on the defendant, the Commission finds there to be no justification for any award for this item.

/s/ O. G. Pinkston
Commissioner

/s/ Joseph B. Turner
Commissioner

/s/ W. C. Lumpkin
Commissioner

ITEM III

APPRAISAL OF ACREAGE LESS THAN THAT ACTUALLY AT ISSUE

In opening remarks Mr. Perry stated that the Alabama Power Company appraiser, Mr. Bob Moss, did not appraise the entire property. Evidence was presented to the effect that map revisions showing the taking on a portion of the subject property in the northeast quarter of the northeast quarter of Section 33, Township 19S, Range 11 E, Randolph County, were made in August, 1978, reflecting a change in the property line from contour 790 above MSL to the center line of Wedowee Creek. The revision changed the acreage in the taking from a

total of 9.76 acres to 15.71 acres, being an increase of 5.95 acres. Mr. Perry stated that the appraisal could not be correct because the timber was cruised and the value of the timber was estimated on July 25 and 26, 1978 by Mr. John White on behalf of the Alabama Power Company and that without the revised maps the correct amount of timber could not be estimated.

Mr. Bob Moss testified to the fact that he had appraised the property for the Alabama Power Company and had been on the property numerous times. He stated that the property line issue was first brought to his attention in 1976 by Mr. Perry and he had referred it to others in the Alabama Power Company and the issue had later been resolved, showing Mr. Perry had title to the property in the referenced quarter quarter section to the center line of Wedowee Creek. His testimony was to the effect that he was aware of the acreage change and knowledgeable of the corrected property line prior to the map revision. He also testified that he had personally informed Mr. White of the change and accompanied him to the tract to inform him as to the property line and the proper area to be cruised prior to the map revision. Under cross-examination various dates of map revisions were testified to and maps produced showing original dates back to 1975.

Mr. John White, forester, testified that he had cruised the timber on the subject property in July of 1978, and that he could not remember Mr. Moss accompanying him to the property but thought that he did or he would not have found the tract. Testimony was taken to the effect that the value of timber in Mr. White's report compared very favorably to that of Mr. Morris, a witness for Mr.

Perry in the September, 1981 hearing, on a per acre basis. The Morris cruise was of timber between the 793 contour and the 800 contour. Additional testimony was to the effect that the 5.95 acres under consideration consisted of bluff land, pasture land, creek bed and timber production land, and that poplar logs which would be native to this type area would have value commensurate with that of pine timber which would grow on a different type soil.

Upon completion of the witnesses' testimony and at the time for closing arguments, Mr. Perry stated that there was additional acreage in the northeast quarter of the northeast quarter of Section 33, Township 19S, Range 11E, that the Power Company had not included in its appraisal. Mr. Perry stated that the day prior to this hearing, August 6, 1984, he and Mr. Ray Edwards, the engineer mentioned previously in this report, measured areas along the eastern boundary of the northeast quarter of the northeast quarter of Section 33, Township 19S, Range 11E and found that there were approximately 1.7± acres in a severed remainder instead of .5 acres as testified to at the September 8, 1981 hearing, and that approximately 1.3 acres more was included in the taking than was shown on the plaintiff's maps.

Although Mr. Edwards had been present earlier as a subpoenaed witness by the Alabama Power Company, and although Mr. Perry had called him to testify, Mr. Edwards had given no testimony with reference to the above, and he was no longer present.

Mr. Perry stated that Mr. Edwards had a sketch, not a survey, of the area, the sketch being made with chain measurements and a transit used to run a straight line.

No such sketch was presented as evidence. No bearings were taken, and no ties to section corners or quarter section corners were made on these estimates. Measurements were from an elevation which was under the water of the lake, the location of which was estimated.

The Commission notes that as early as 1976, as testified to by Mr. Moss, problems of property lines were brought out by Mr. Perry and resolved. In the hearings of 1981 the problem of property lines referred to in Item 2 were brought to the Commission's attention, but nothing was done to substantiate this last mentioned claim until the day prior to this hearing and then only to the extent of chaining to an *estimated* elevation and not an actual survey of the property. It is noted that the surveyor, Mr. Edwards, had been released as a witness prior to any information with regard to this property being brought to the attention of the Commission.

FINDINGS OF THE COMMISSION AS TO ITEM III

The Commission unanimously finds that with respect to the additional land claim no additional award is justified by the evidence.

The Commission also unanimously finds that Mr. Moss appraised all of the land.

/s/ O. G. Pinkston
Commissioner

/s/ Joseph B. Turner
Commissioner

/s/ W. C. Lumpkin
Commissioner

Commissioners Turner and Lumpkin find that enough doubt exists from the evidence that an additional award of $2,653.83 is due the defendant for timber which probably was not included in the previous award.

This amount is calculated as follows:

5.95 acres total
—2.72 acres open

3.23 acres woods @ $821.62 = $2,653.83

The Commission awards the defendant the sum of $2,653.83 as full, complete and just compensation for the additional timber taken which was not included in the award based on the hearing of September 8 and 9, 1981.

/s/ Joseph B. Turner
Commissioner

/s/ W. C. Lumpkin
Commissioner

Commissioner Pinkston is of the opinion that the preponderance of the evidence was to the effect that all timber was included in the original award, and he dissents from the majority finding of the Commission. The fact that the map had not been revised as of the date of the cruise would not preclude the knowledge of Mr. White of the corrected area to be taken and a proper cruise of the area. The comparison of the White cruise and the Morris cruise gives weight to a cruise of all the timber.

/s/ O. G. Pinkston
Commissioner

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
A Corporation,
Plaintiff,
VS. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc.; ET AL,
Defendants.

ORDER OF REMAND

(Filed April 18, 1984)

Pursuant to the Opinion and Orders of the United States Court of Appeals for the Eleventh Circuit dated July 11, 1983, [709 F.2d 666] and March 7, 1984, this cause is remanded to the Commission heretofore appointed for a further report upon consideration of the following:

1. In assessing total value of land taken, did you consider the value, if any, of riparian rights?

If your answer is "No", please take into consideration such value and report the gross total value of land taken to the Court. In doing so, you must not offset enhancement to the remaining property against the value of riparian rights, but you may consider it to offset damages if any, to the remaining land. For instance, it may be considered to offset damages for interference with rights to water livestock running on the remaining lands.

2. In assessing the total value of land taken, did you consider and include in your evaluation of land taken

whether or not any additional amount of land had eroded or been pressed down to below the contour line at which Defendant Perry's property commences?

If your answer is "No", please include in your report the value of any such additional land, if any.

3. It is further ORDERED that the Commission provide Robert A. Perry another opportunity at another hearing to prove that the condemnor's appraisers appraised acreage less than that actually at issue. If the Commission's report was based on any such error, the Commission is ORDERED to make a new report evaluating all land at issue or reporting that the former report considered such issues.

4. The Commission may consider evidence offered as to these issues only and shall not consider further evidence of the value of minerals or other issues not herein enumerated.

DONE this 18th day of April, 1984.

/s/ R. E. Varner
United States District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
A Corporation,
Plaintiff,
VS. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc.; ET AL.,
Defendants.

ORDER

(Filed April 18, 1984)

This cause on appeal was reversed in part and remanded to this Court by the United States Court of Appeals for the Eleventh Circuit with instructions. Since it became obvious that the parties did not and do not agree upon the issues left open, this Court on December 12, 1983, wrote a letter which, inter alia, precipitated responses of the parties. The positions taken by Defendant Perry are set out in his motion filed November 9, 1983, for new Judge and Commission, his objections and request for instructions and enlargement of issues filed herein January 3, 1984, and his answer filed herein April 6, 1984, to Show Cause Order. Defendant Perry's position as to the value of the land taken and damaged appears at pages 16, 17 and 18 of said answer.

This Court is of the opinion that said documents filed by Defendant Perry contain extraneous matters which this Court has no jurisdiction to consider on remand but

that Defendant Perry has a right to seek review of this Court's disregard of such matters.

Accordingly, it is ORDERED that the above-referenced documents be made a permanent part of the record in this case.

DONE this 18th day of April, 1984.

/s/ R. E. Varner
United States District Judge

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY
a corporation

Plaintiff,

vs. CIVIL ACTION NO. 78-213-E

1354.02 Acres, etc., et. al.,

Defendant

MOTION FOR
NEW JUDGE and
NEW COMMISSION

Judge Varner has been careless in his review of the Commissioners findings, showing bias toward the Alabama Power Company. In his opinion under timber he has conceded that the record is not clear but failed to try to resolve the issue to see that Robert A. Perry received just compensation—under Fence value. The law is plain that everything in the taking must be paid for. There was more fencing value in the taking than was paid for the entire land including fencing, riparian rights, minerals and other improvements. This is bias and prejudiced in favor of Alabama Power Company.

Under riparian rights, the law is clear that these rights must be paid for. They are separate from land value. Judge Varner has attempted to justify the [sic] Commissions actions even though all testimony by Alabama Power Company clearly states that nothing was paid for riparian rights. There was [sic] no instructions given Commission that riparian rights had to be paid for as the law states.

This is clearly action that shows bias to Alabama Power Company.

Under Minerals—The experts are misquoted in a biased manner. The qualifications of the experts are discussed in a biased manner. Mis-statements about the opinions of value are made. The expert for Alabama Power Company gave no opinion of value. He had never been on Robert A. Perry's land. The only opinions given on value showed that there was great value on minerals on the property. The testimony of value by Dr. McCarl met the burden of proof according to law. There was no denial of value. Alabama Power Company stated that no mineral appraisal was done even after Robert A. Perry stated in his original answer to the court that he was claiming minerals. The statement of Dr. McCarl making a casual observation is extremely biased. The mention of adverse mineral ownership on 40 acres is irrelevant to the hearing, but was considered by the Commission. Commission showed bias by not letting Robert A. Perry accompany them to observe the property and allow him to point out the location of minerals which are not claimed on this 40 acres. The mineral claim was on 80 acres. The tract contained 185 acres.

This discitation [sic] showed a total disregard for Robert A. Perry's rights to just compensation and are biased toward Alabama Power Company.

On Fair Compensation for Land—Highest and best use was not considered. This showed prejudice and allowed devaluation in favor of Alabama Power Company. The $10,000.00 value figure quoted by Judge Varner is but one component of land value, the other components are, riparian rights, timber, minerals and improvements. He uses

the figure as if it was the total price testified to by Robert A. Perry. This is biased and prejudicial.

Stating that it was Robert A. Perry's obligation to prove the amount of land and there [sic] determination is supported by the evidence. Robert A. Perry was denied the right to show that the maps were wrong. This is bias.

Concerning Damages—Highest and best use were not considered. Comparables sales that were not comparable were used as the basis of value. All these things show that the chances of receiving an unbiased judgment from this Commission or Judge is not likely.

The instructions used were totally inadequate and biased in favor of Alabama Power Company.

It is obvious that the Commission under the instructions given it by the Judge did not rule according to law. Neither did they rule consistent to evidence presented nor did they follow rules given to the Commission. They did not rule consistent on the different cases before them. They have shown bias and prejudice in favor of Alabama Power Company. I do not believe it is possible for them to reverse themselves on any of the points in question and a fair hearing before them would be impossible. These same difficult questions and points of law will still remain.

The Honorable Judge has been accused of clear error of law by the Eleventh Circuit. He has also refused to change the judgement of the Commission even though there was evidence to the contrary.

It is my opinion that I have little chance for justice before the present Judge or Commission. Bias and prejudice are evident. Judge Varner and the Commission will

be prejudiced and [sic] bias to justify their former ruling rather than seeking to render a just opinion.

Judge Varner should recuse himself from hearing this case.

Judge Varner has ruled against the preponderance testimony of Dr. McCarl on minerals even though his testimony met the burden of proof according to law. He ruled in favor of a man who had never seen or been on the property and a man who gave no opinion of value.

The issues are the valuation and payment for land, timber and riparian rights.

The Eleventh Circuit Court ruled that just compensation must be received by Robert A. Perry, therefore all issues affecting value must be open to examination. New testimony will have to be heard. New and old witnesses will be needed.

I respectfully request a new Commission and new Judge. If neither of these are possible I request that the hearing be before The Honorable Judge Varner rather that [sic] the same Commission. Additional instructions will be needed.

I wish to present new and additional evidence.

Yours very truly.

/s/ Robert A. Perry

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing pleading has been served upon counsel for all parties represented by counsel and upon all parties not represented by coun-

sel by mailing the same to each of such attorneys or parties to his or her last known address with first-class United States postage prepaid on this the 8th day of November, 1983.

/s/ Robert A. Perry

Hon. Robert E. Varner
P.O. Box 2046
Montgomery, Alabama 36103

Hon. Edward S. Allen
P.O. Box 306
Birmingham, Alabama 35201

APPENDIX R

ALABAMA POWER COMPANY, a corporation, Plaintiff-Appellee,

v.

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, and Gladys Graves, et al., Defendants-Appellants.

No. 82-7352

Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

July 11, 1983.

Rehearing and Rehearing En Banc Denied Sept. 19, 1983.

Property owner appealed from an order of the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, awarding damages in eminent domain proceeding. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights; (2) district court erred in assuming that the commissioners who were appointed to determine compensation took the riparian values into account in assessing the total land value, because the property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's instructions to commissioners were not so clear that

the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; and (3) district court erred in upholding commissioners' determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps.

Affirmed in part; reversed in part and remanded.

1. Federal Civil Procedure 2068

In condemnation proceeding, trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights, because there is no constitutional right to a jury in an eminent domain action. Fed.Rules Civ. Proc. Rule 71A(h), 28 U.S.C.A.

2. Eminent Domain 124, 145(1)

In eminent domain proceeding, property owner must receive just compensation for condemned property, without regard to any enhancement of the remaining land; damage to remaining land, however, may be offset by enhancement in the value of that land.

3. Eminent Domain 63, 124

Once land containing water and access to that water is condemned, the taking is complete, and enhancement of remaining land may not be set off against the riparian rights.

4. Eminent Domain 238(6), 263

In eminent domain proceeding, district court erred in assuming that commissioners who were appointed to determine compensation took riparian values into account in assessing total land value, because property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's instructions to commissioners were not so clear that the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; therefore, cause would be remanded on issue of riparian rights to ensure that property owner was compensated for value of those rights taken.

5. Eminent Domain 186, 263

In eminent domain proceeding, district court erred in upholding commissioners' determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps; cause would be remanded to provide property owner an opportunity to prove that condemnor appraised insufficient acreage.

Robert A. Perry, pro se.

Edward S. Allen, Birmingham, Ala., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

On November 14, 1978, Alabama Power Company filed a complaint in condemnation in the United States District Court for the Middle District of Alabama pursuant to 16 U.S.C. § 814. After disposing of certain issues on summary judgment the court appointed three commissioners to determine compensation due landowners pursuant to Fed.R. Civ.P. 71A(h). Appellant's case was joined with the cases of other parcel owners pursuant to Fed.R.Civ.P. 71A(b). The commissioners assessed compensation due appellant at $14,350. Appellant thereupon brought exceptions to the commissioners' report before the district court, said exceptions being heard on August 12, 1982. On September 17, 1982 the district court entered a memorandum opinion and order confirming the commissioners' report and setting compensation at $14,450. Perry appeals the district court's order.

Appellant raises seven grounds on appeal. All but the jury trial issue relate to findings of the commissioners, and were raised and resolved before the district court. The jury trial issue was addressed in the order of the district court appointing the commissioners. On the issues of compensation for minerals, damages to remaining land, best use and improvements we affirm on the basis of the opinion below.

On the basis of the remaining issues, discussed *infra,* we affirm in part, reverse in part, and remand.

1. *Jury Trial*

[1] Appellant argues that the district court's refusal to try the issue of condemnation to a jury, despite appellant's jury demand, was a violation of his constitutional rights. The Federal Rules of Civil Procedure specifically provide for the appointment of commissioners in lieu of a jury, however, in condemnation actions in which the district court determines that the ends of justice best would be served by foregoing trial by jury. Fed.R.Civ.P. 71A(h). We have held that Rule 71A(h) does not offend the right to trial by jury, there being no constitutional right to a jury in an eminent domain action. *United States v. 5.00 Acres of Land, Etc.,* 673 F.2d 1244 (11th Cir.1982). The court below made appropriate findings that the ends of justice would be served best by appointment of commissioners. Accordingly, this claim is without merit.

2. *Compensation for Riparian Rights and Damages*

Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. Appellee responds that "[t]he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission . . . and the District Court . . . found enhancement to the remainder as a result of the reservoir." The Commission mentioned appellant's claim as to riparian rights, but made no finding. The district court assumed the riparian rights "must have been" considered in assessing

the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellees, however, this assumption was error.

Compensation for the taking pursuant to 16 U.S.C. § 814 is a question of federal law, which is resolved here by reference to Alabama law. *See Georgia Power Co. v. Sanders,* 617 F.2d 1112 (5th Cir.1980) (en banc). The Alabama Code clearly states that except in cases involving condemnation for highways or water conservancy projects, enhancement to the remaining land is *not* to be considered in determining "just compensation" for the land taken. Section 18-1-18, *Code of Alabama* (1975). That provision has been construed, however, not to preclude consideration of enhancement of the remaining land to offset *damage* to the remaining land. *Town of Eutaw v. Botnick,* 150 Ala. 429, 43 So. 739 (1907).

[2, 3] In other words, there is a distinction made between the land taken and the land remaining. The property owner must receive "just compensation" for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land, however, may be offset by enhancement in the value of that land. Appellant's claims for damages due to interference with watering rights, for example, clearly are damages to remaining property which, under the *Town of Eutaw* rationale, may be offset by any enhancement. That is not the case, however, with riparian rights. Once the land containing water, and access to that water, is condemned the taking is complete. Those rights are akin to condemned real property. Enhancement, therefore, may not be set off against riparian rights. As riparian rights fall on the "taking" side of the equation, denial of the rights must be compensated.

[4] An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the Federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for riparian rights in the relevant condemned area. Appellant apparently introduced that statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took the riparian values into account in assessing the total land value.

This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

3. *The Area Cruised for Timber*

[5] Appellant claims the timber cruiser failed to cruise all of appellant's property, with the result that appellant was inadequately compensated for his timber and land. The basis for this allegation is a claimed discrepancy between the actual property and the map utilized by Alabama Power to assess the amount of compensation and guide the cruisers. Further, appellant claims an additional amount of acreage has eroded, or been "pressed down," to below the contour line at which his property commences.

The Report of the Commissioners does not mention this contention of appellant.

The district court upheld the ultimate finding of the commissioners as to the amount of compensation. As to the two issues concerning acreage (payment for timber and for land) the court acknowledges that there is evidence to support appellant's contention; nevertheless, the court finds the commissioners' determination that all the land was assayed "not clearly erroneous." We disagree.

It appears appellant attempted to raise the validity of the survey maps before the commissioners, but they declined to hear the evidence, finding it outside their jurisdiction. The timber cruiser and appraiser testified they appraised all the land, as indicated on the maps. If the maps were incorrect, however, their determinations as to the proper amount of compensation would be incorrect as well. As the commissioners demurred to the question of whether Alabama Power's maps were correct, it was incumbent upon the district court to hear appellant's testimony and permit him an opportunity to prove his case. Upholding the determination of the commissioners as "not clearly erroneous" when they failed to provide appellant an opportunity to prove his point was a clear error of law.

The district court, in an argument adopted by appellee before this court, held alternatively that as the total timber value awarded by the commission exceeded that calculated by appellant, there was no harm done appellant. This argument does not satisfy the legal requirement of "just compensation." The amount of money awarded for timber is a product of two variables; acreage and per acre timber value. The commissioners found as a fact that the per acre figures should have been higher than those suggested by

appellant. That determination is separate from, and irrelevant to, a determination of the total acreage. If appellant is correct that Alabama Power cruised the wrong number of acres, then appellant is entitled to the correct acreage multiplied by the per acre dollar figure arrived at by the commissioners. We remand therefore, to provide appellant an opportunity to prove that Alabama Power appraised and cruised insufficient acreage, and for whatever adjustments are thereby required.

AFFIRMED IN PART; REVERSED IN PART and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX S

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
A Corporation,

Plaintiff,

VS. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc.; ET AL.,

Defendants.

JUDGMENT

(Filed September 17, 1982)

In accordance with the Opinion entered in the above-styled cause on this date and in accordance with the Report of the Commissioners filed herein January 13, 1982, it is

ORDERED, ADJUDGED and DECREED by this Court that Robert A. Perry and wife, Sara Kate Perry, as owners of interests in the property taken, have and recover of the Plaintiff the sum of $14,350.00, together with interest thereon from the date of the Plaintiff's entry into possession of the property until the date of this Judgment, as just compensation for the taking of property involved here.

DONE this 17th day of September, 1982.

/s/ R. E. Varner
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
A Corporation,
Plaintiff,

VS. CIVIL ACTION NO. 78-213-E

1354.02 ACRES, Etc.; ET AL,
Defendants.

OPINION

(Filed September 17, 1982)

This cause is submitted on the report (and objections thereto) of the Commissioners appointed to appraise and report to the Court the value of land taken by the Alabama Power Company for public use and the damage, if any, to the remaining property of the Defendant-Claimant.

The Claimant was the owner of 185.88 acres (possibly subject to an adverse mineral interest in 40 acres thereof). The Power Company took 15.71 acres for development of the lake property, leaving the Claimant 170.17 acres. The Commissioners reported that the value of the taking was $14,350.00. The report was based on their conclusion that the value of 10.64 acres actually taken and an easement on 5.07 acres was: 4 acres at $400.00 an acre, 6.64 acres at $300.00 an acre and an easement on 5.07 acres at $300.00 an acre; timber taken at $8,019.00; and the cost of replacing roads for access cut off by the lake at $1,200.00, for a a total of $14,350.00. The Commissioners reported that the value of the whole place was enhanced by the taking. The Power Company experts appraised the property ta-

ken and damaged at $12,728.00, so there is no question that there is evidence in the record to support the final finding of the Commissioners.

It is conceded that the review provided by this Court is controlled by Rule 53(e)-2, Federal Rules of Civil Procedure, and that it is the duty of this Court to reverse and remand the proceeding to the Commissioners upon a finding of clearly erroneous findings in the record. As the Claimant has raised a number of different issues, this Court will address them under separate headings.

TIMBER VALUE. The Claimant insists that the finding of the Commissioners, that the timber taken was valued at $8,019.00, was clearly erroneous because he says the appraiser for the Power Company appraised only 9.6 acres of the timber, whereas there were 15.1 acres of timber taken. While there is some ambiguity in the record as to whether the appraiser for the Power Company (who is a well-qualified timber cruiser) cruised all of the property, it is obvious that, since one of the Plaintiff's witnesses testified that the timber was worth only $7,320.07 and the Commissioners found that the timber was worth $8,019.00, there could be no plain error in the finding of the Commissioners. In any event, there was a careful discussion at the time of the hearing as to the amount of the property that the Power Company appraiser cruised, and the Commissioners must clearly have understood the position taken by both parties about that cruise.

FENCE VALUE. Claimant insists that, under Rule 48 of this Court's charges to the Commissioners, the Commissioners had the duty to itemize the value of improvements to the property; that the Commissioners failed to

itemize the value of fencing on the property; and that the finding of the Commissioners was, therefore, clearly erroneous in not making such an itemized finding of value of fencing. The evidence shows that there was some fencing on the property. The Commissioners had a large number of sales as comparables, and there was excellent fencing on a good deal of this property. The Court finds that the Commissioners were not clearly in error in not attempting to divorce the value of fences from value of property in making their report.

RIPARIAN RIGHTS. The Claimant insists that the Commissioners were in error in not granting him some payment for his loss of riparian rights to a portion of a branch and a spring which were on the property taken. The Commissioners reported no damage for loss by the Claimant of riparian rights. The Claimant bases his claim largely on a statement made by an appraiser for the Power Company in a hearing before the Fe[d]eral Power Commission (now the Federal Energy Regulatory Commission) that it was estimated that the Power Company would have to pay $2.00 a foot for riparian rights on property that it expected to condemn in this area. That statement, apparently, was admitted in evidence by the Commissioners as a statement against interest by the Power Company, but it was given purely as an estimate in a related proceeding. Whatever loss there may have been, if any, was not independent of the value of the land, and must have been considered by the Commissioners in their appraisal of the land. The matter was discussed at the hearing before the Commissioners, and this Court has no reason to believe that the determination by the Commissioners was, therefore, clearly erroneous.

GOLD. The Claimant's largest [claim] is based on the theory that there is substantial gold on the property in question and that the taking of the property involved taking of valuable mineral rights in the 15 acres taken and in the blocking of mining on the remaining 170 acres. It appears from the evidence that there had been some surface mining of gold at one time on some of the property in question and that there remained some old pits on the property but that no mining had been done in the county in many years. The Claimant cites as a precedent in the awarding of damages for the taking of mineral rights the case of *United States v. 179.26 Acres of Land in Douglas County, Kansas*, 644 F.2d 367 (10th Cir. 1981). There is a difference in fact as to the referenced case and the case in controversy. *Douglas County* concerned itself with an existing quarry which was currently producing limestone, while in the present case, Claimant is asking for an evaluation of mineral rights based on mines dug in the 1800's and apparently abandoned for many years for failure to produce as hoped. During some of these years, record gold prices were being paid. In this case, Claimant failed to satisfy the Commissioners by a preponderance of the evidence that there were valuable mineral deposits on his land. Each party produced an expert. The Claimant's expert testified that the value of gold on the five acres taken was $2,390.00 an acre or $11,950.00 and that the damage to the remainder, in that gold minerals on the property could not be mined safely because of the water in the lake, would be $179,250.00. He further testified that, based on his observation, there were 300,000 tons of gold ore in this area. This testimony, if believed by the Commissioners, could well have formed the basis of a much more substantial award than that entered by the Commissioners.

However, the Commissioners could have been more impressed by the testimony of the expert produced by the Power Company, especially in view of the fact that no mining had been done in the area since the 1800's and there was no showing that the mining done even in the 1800's produced gold of any great value. The Power Company's expert testified generally that any remaining gold in the area could be reclaimed only at an expense in excess of the value of the gold and that no gold whatsoever had been mined in the area in many years. Apparently the cost and feasibility of mining were not proved to the satisfaction of the Commissioners. The Claimant's expert was an associate professor employed by the Department of Economics at the University of Alabama in Birmingham who instructed in economics and in earth science and geology at UAB. The Power Company's expert was a professor of geology in the Geology Department at the University of Alabama in Tuscaloosa, a former employee of the U.S. Geological Survey, rising until he became Chief of the Water Resources Division of the United States Geological Survey in Washington. He remained in this position until he retired to take the job as State Geologist for the State of Alabama upon the retirement of Dr. Walter B. Jones, where he served from 1961 until 1976, serving as both State Geologist and as a Professor of Geology at the University of Alabama. Both experts have been involved in consulting in geological evaluations. The former State Geologist testified to his long familiarity with gold mining, exploration, and history in Alabama and otherwise. The qualifications and the opinions of the two experts varied widely as to the value, if any, of gold in the area. Suffice it to say that the Commissioners had all of the evidence and considered all of the facts presented to them. They concluded that the testimony of

the former State Geologist, based on his examination of geological maps and knowledge of the general area, when considered in the light of the fact that there had been no mining in the whole county during this century, outweighed the testimony of the UAB expert of the great amount and value of gold in the area based on reading assays of others and on more or less casual observation for less than a day of the ancient pits on the property. This Court cannot find that such a conclusion was clearly erroneous.

The Power Company presented in evidence to the Commissioners a deed from a predecessor in title to the Claimant of the mineral rights on 40 acres of the property in question, which would indicate that the Claimant did not own the mineral rights under 40 of the acres of the remainder property to which he made claim of damage to mineral rights. Since the deed was, apparently, somewhat of a surprise to the Claimant on the occasion of the hearing, this Court would ordinarily, if the deed were pertinent, give the Claimant an opportunity to study this title question and present evidence which might tend to show that he actually regained title to that mineral interest.[1] However, the Commissioners considered the evidence without the benefit of the deed as indicating that the Claimant was not damaged as to mineral interests. In view of that, this Court can see no relevance in attempting to vindicate Claimant's title to the 40 acres of mineral interests and will hold that the deed

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[1]The Claimant argues that the Commissioners had no authority to determine title, *Chandler* v. *United States*, 372 F.2d 276; *United States* v. *Marion County*, 420 F.2d 1136; *United States* v. *Statesbor[o]*, 384 F.2d 677; *United States* v. *Waymire*, 202 F.2d 550. The Commissioners' computations show that the evidence upon which their report was based was evidence of value, or lack thereof, of minerals on the entire place.

in question was immaterial and, therefore, will not grant the Claimant an opportunity to present further evidence on the question of title to the mineral interests. The Commissioners have apparently determined that no damage was done to the mineral interests on the remaining property, including the 40 acres, and that nothing has been taken from the value of the mineral interests on the 40 acres in question.

FAIR COMPENSATION FOR LAND. The Claimant contends that the Commissioners committed plain error in accepting the evaluation of the Power Company's expert of the land in question at the figure of $5,113.00 while the Owner of the land testified that it was worth $10,000.00. Claimant's contention appears to be based on the fact that he states that the Power Company expert testified that the highest and best use of the property in question, or at least some of it, was for cattle production as well as for timber production, whereas the expert considered the land only for timber production. There was evidence that the property was used as a wooded pasture up until about 1979. Apparently, Claimant also contends that it should have been considered that the land was also best used for gold mining as well as for timber and cattle production. However, the Claimant himself testified that the land taken, being 15.71 acres, had a fair evaluation of $10,000.00 and the Power Company expert testified that it was fairly valued at $5,113.00. The Commissioners calculated the land with timber intact to be worth $13,132.00 or over $820.00 an acre. Suffice it to say that there was evidence before the Commissioners that the land was worth exactly what they concluded it was worth and, said evidence being credible, this Court finds that there was not plain error in accepting the Power Company's evaluation of the land.

OMISSION OF CERTAIN LAND IN POWER COMPANY APPRAISALS. The Claimant contends, as he contended during the presentation of this matter to the Commissioners, that Mr. White—in evaluating the timber—and Mr. Moss—in evaluating the real estate—appraised only nine acres, whereas the amount taken was about 15 acres. While this contention had some apparent support in some of the evidence, there was other evidence showing to the satisfaction of the Commissioners that the appraisers were evaluating all of the property in question and the Commissioners were not in error in so concluding, in the opinion of this Court. An early survey map showed somewhat less than the 185.88 acres in the place, and the Claimant contends that the Power Company experts based their appraisal on the amount of acreage shown therein rather than the amount actually taken. However, Mr. Moss testified that his appraisal was based on "185.88 acres, a little more than shown on survey map." Clearly, there was evidence on which the Commissioners could reasonably conclude that Mr. Moss and Mr. White did appraise the proper acreage in submitting their appraisal to the Commissioners, and this Court cannot, therefore, say that the finding of the Commissioners was clearly erroneous. The conclusion reached by the Commissioners that Claimant's contention, that over an acre of the property was originally above the elevation called for and had been pressed down by Power Company vehicles to allow the Power Company more acreage than originally contemplated, did not justify the conclusion that the Power Company received more than the condemned acreage, was not clearly erroneous. The burden of proof is on the Claimant to establish the amount of acreage taken and the value thereof to the reasonable satisfaction of the Commissioners, and their determination is supported by the evidence in this case.

AWARD FOR DAMAGE TO REMAINING LAND. The Claimant contends that the land remaining after the taking has been damaged to the extent of $500.00 for interference with cattle watering on the premises, $179,000.00 for interference with mineral value, and $1,200.00 for road usage. The Commissioners found that the value of the land remaining was enhanced by the presence of the lake and that, therefore, the land remaining after the taking was worth a good deal more than the value of the land before the taking. Since there was substantial evidence from which the Commissioners could have determined this fact, the finding by the Commissioners was not clearly erroneous.

The Claimant has sought in the hearing conducted by this Court to offer new evidence which was not tendered at the Commissioners' hearing and which the Claimant has not sought to prove a right to offer after conclusion of the original hearing. This Court understands that a full and fair hearing was given at the time of the Commissioners hearing and that there must be an end to litigation. Accordingly, the objections to the new evidence offered have been sustained and that evidence was not considered by this Court.

Judgment will be entered in accordance with the report of the Commissioners and in accordance with this Opinion.

DONE this 17th day of September, 1982.

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

vs. CIVIL ACTION NO. 78-213-E

1354.02 Acres, etc., et al,

Defendant.

PETITION FOR REVIEW

Comes now the Defendant in the above styled case and makes Petition for Review to the U.S. District Court for the Middle District of Alabama, Eastern Division and states:

1. Petitioner is owner in fee simple of the real estate described in the Complaint.

2. That Plaintiff, Alabama Power Company, instituted condemnation proceedings against Defendant's lands.

3. That a Commission was appointed by the Court to determine the value and damages of Defendant lands taken and the Commission found in the amount of $14,350.00; Defendant seeks a review by this Court of the Commissioners award of damages.

4. In addition to the foregoing, the award of the Commissioners is indefinite in that the exact lands for which the award was made were improperly and indefinitely described making it impossible for the award to be proper. Defendant owns lands taken physically by the

Plaintiff but which lands have not been described in Plaintiff's petition for condemnation.

5. Defendant prays that Your Honor will grant all relief prayed for the Defendant's *Exceptions to Commissioners Report.*

6. Defendant prays that Your Honor will order that the District Clerk determine the cost for transcribing the record of the Commissioners hearing conducted in the case and advise the Defendant and Defendant will immediately tender the costs into Court. Defendant has tendered the sum of Two Hundred ($200) Dollars for costs with this petition, but does not know the amount of the costs and respectively requests that Your Honor will set the same. Defendant requests an original transcript of the Commissioners hearing be provided this Court with a copy sent to the Defendant. Defendant moves that all Defendant's pictures and documents entered in evidence be reviewed.

WHEREFORE, Petitioner prays for a review of the Commissioners award by *jury trial* for the purpose of ascertaining the just damages payable to the Defendant by reason of condemnation of Defendant's property and Defendant prays for all of the relief asked for in the Defendant's *Exceptions to Commissioners Report* filed along with this Petition for Review.

DEFENDANT MOVES FOR AN ORAL HEARING ON THIS PETITION.

/s/ Charles Ned Wright
Attorney for Defendant

/s/ Robert A. Perry

STATE OF ALABAMA
RANDOLPH COUNTY

The undersigned, Robert A. Perry, hereby verifies that the above statements are true and correct to the best of his knowledge and belief.

/s/ Robert A. Perry

Sworn to and Subscribed before me this 28th day of January, 1982.

/s/ Andrea W. Wright
Notary Public
State at Large

My Commission Expires 8-18-84

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

This 28 day of Jan., 1982.

/s/ Charles N. Wright
Attorney for Def.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

vs. CIVIL ACTION NO. 78-213-E

1354.02 Acres, etc.,; et al,

Defendants.

EXCEPTIONS TO COMMISSIONERS REPORT

Defendant excepts to Commissioners Report of appraisal herein on the following grounds:

1. The Report fails to specify the amount of money awarded for the easement area and fails to specify the number of acres that was taken in fee simple and fails to specify the number of acres upon which the easement was imposed.

2. The Commissioners failed to award the Defendant any money for the timber located on 5.95 acres of land which land and timber was taken by the Plaintiff.

3. The Commissioners failed to award the Defendant any money for $5700.00 worth of fences which were taken by the Plaintiff.

4. The Commissioners failed to award the Defendant any money for riparian rights for the running creek which was taken by the Plaintiff.

5. The amount of enhancement immediately after the taking awarded by the Commissioners was against the great weight of the evidence presented at the trial and Defendant says the evidence shows there to be little or no enhancement due to the dam project immediately after the taking.

6. The Commissioners failed to consider the great weight of the evidence and failed to award a fair and just compensation for the surface rights of the lands taken by the Plaintiff.

7. The Commissioners failed to award damages for the areas cut off and passage ways cut off by the taking of Defendants lands. Commissioners also failed to award damages for the cutting up of the Defendant's property.

8. The survey of the Plaintiff's did not include all of the property bordering the creek and Plaintiff's have taken timber from land, cleared lands of the Defendant which are not described within the Plaintiff's survey.

9. Plaintiff's took an acre of land which was above the 790 and below the 800 foot elevation which is an island and which the Defendant was not compensated for.

10. The award for improvements on the Defendant's property was much too low and contrary to the great weight of the evidence presented.

11. That the Commissioners failed to award the Defendant any money for his gold deposits or any mineral deposits which was against the evidence presented at the hearing. The testimony of the Defendant's expert witness, Dr. Henry McCarl, was unrebutted as to the $191,000 value of the mineral deposits in the taking. The Commissioners Report stating that "No creditable evidence was given to quantity, quality, or market of gold projected to be mined." is a false statement and is clearly rebutted by Dr. McCarl's testimony. Dr. McCarl also gave evidence as to gold reserves in great detail. The gold assays which were in Dr. Carl's [sic] possession were testified to freely and in great detail by Dr. McCarl and his testimony of the assays was never questioned or objected to by the Plaintiff nor rebutted by the Plaintiff. Defendant's mines contained marketable ore by Dr. McCarl's testimony due to the great rise in the value of gold during the 1970's and the ore content was well above that of operating mines at the time of the taking in 1978.

12. Mr. Robert Perry testified to a highest and best use as for the mining of gold in conjunction with raising of

forest products *and cattle farming* which is not the wordage used by the Commissioners.

13. Defendant says Commissioners made their awards under a false assumption that the Plaintiff was not taking the Defendant's water rights when in fact under Alabama Law, the Plaintiff did take Defendant's water rights and failed to compensate Defendant for said water rights.

14. The Defendant's constitutional and lawful rights were violated in that Plaintiff paid other property owners more money for buffer strip properties, which were bought in fee simple than was property with an easement buffer strip which in fact the easement cut off basically all ownership rights and placed burdens upon the property owner, Defendant. The Plaintiff was given the option to purchase in fee simple or purchase in easemet, yet, the condemnation is further unconstitutional because the Plaintiff did not treat all property owners the same and as the purchases show that the Plaintiff took some buffer properties in fee simple and took other buffer properties in easement. Other properties taken in fee were taken under threat of condemnation.

15. That the total award and all of its separate elements is grossly inadequate and does not fully compensate Defendant for the full and reasonable value of the property sought.

16. Commissioners did not use the proper measure of damages in arriving at the amount set forth in the award in that they did not consider all of the elements set forth in all of the objections.

17. The description of the property taken was inadequate and failed to confer jurisdiction on this Court to acquire land set forth in the petition.

18. Testimony was admitted over Defendant's objection and Defendant asks for a review of each and every exception and objection.

19. Some of the Commissioners expressed disbelief that that marketable gold exists in Randolph County, Alabama.

20. The radio station in Roanoke, Alabama being in Randolph County, Alabama made an announcement which was unusual which in essence was as follows:

> "They say there used to be gold in Randolph County and at least one man believes there still is and is asking for $3,000,000 for gold from Alabama Power Company."

This statement was made shortly after the hearing and prior to the Commissioners making their awards. There was widespread talk about the statement and two of the Commissioners live in Randolph County, Alabama.

21. The Commissioners failed to award Defendany [sic] any money for riparian rights to a spring and running branches.

22. The damages to [sic] Defendants property along if properly awarded would have exceeded the enhancement claimed by Plaintiff.

23. Amounts Commissioners awarded Defendant were inconsistent with amounts awarded other property owners on comparable property and damages to property.

24. Plaintiff did not present proper comparables for pasture land [sic] but only presented timberland comparables.

25. Damages in particular to the remaining lands for gold mining were not considered.

26. No award was made for Defendant's pastureland.

WHEREFORE, Defendant moves that:

(1) The report of the Commissioners be set aside;

(2) The Plaintiff be required to include all of Defendant's property which is in the taking area, to be described properly, and compensated for in the award;

(3) That the Defendant be allowed a trial before a struck jury;

(4) If Defendant is not allowed a jury trial, that a new Commission be appointed to hear the Defendant's case as the Commissioners presently appointed could not hear the case without being biased by the previous hearing and report rendered;

(5) That Plaintiff be required to pay just compensation as required by the Constitution and law and that Defendant be compensated for all rights taken and for all property.

/s/ Charles Ned Wright
Attorney for Defendant
102 South Main Street
P. O. Box 132
Wedowee, Alabama 36278
Telephone: 205/357-2416

/s/ Robert A. Perry

STATE OF ALABAMA
RANDOLPH COUNTY

The undersigned, Robert A. Perry, hereby verifies that the above statements are true and correct to the best of his knowledge and belief.

/s/ Robert A. Perry

Sworn to and subscribed before me this 28th day of January, 1982.

/s/ Andrea W. Wright

Notary Public
State at Large
My Commission Expires 8-18-84

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

This 28 day of Jan., 1982.

/s/ Charles Ned Wright
Attorney for Def.

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ALABAMA POWER COMPANY
A CORPORATION,

Plaintiff,

vs.

1354.02 Acres, etc,; et al,

Defendant. Civil Action No. 78-213-E

PARCEL NO. 55
ROBERT A. PERRY
REPORT OF COMMISSIONERS

(Filed January 13, 1982)

The Commissioners heretofore appointed by this Honorable Court to hear evidence and to make awards as to just compensation to the owners of several parcels of land described in the decree of this Court heretofore made, did, in pursuance of and under authority and direction of the decree, meet in Opelika, Alabama, on the 8th and 9th day of September, 1981, for the purpose of hearing evidence of just compensation to be paid to the owners of Parcel No. 55 for the taking of a portion of said parcel and for the imposition of an easement for shore line control on a part of the remainder of said parcel.

There were present, other than the Commissioners appointed, the Honorable Edward Allen and the Honorable Lewis Hamner, as counsel for the Alabama Power Company, the Honorable Ned Wright, as counsel representing the owner, Mr. Robert Perry, who was present. Testimony

was taken in the above case and exhibits offered in evidence which the Commission accepted and the Commission makes the following report:

1. LOCATION AND GENERAL CHARACTERISTICS

The subject property consists of 185.88 acres lying in Sections 28 and 33, Township 19S, Range 11E, Randolph County, Alabama. The property lies approximately 2 miles northwesterly of the City of Wedowee and approximately 1 mile east of Highway 431 and less than ½ mile east of relocated Highway 431. Access to the property is by asphalt paved county maintained road. The topography varies from steep bluffs along the southern portion at the creek to gently rolling in other sections.

2. THE HIGHEST AND BEST USE OF THE SUBJECT PROPERTY

The highest and best use of the subject property, in the opinion of the Commission, prior to the taking would be for the growing of forest products. Subsequent to the taking the highest and best use of the property, in the opinion of the Commission, would be for a combination of forest production with certain areas abutting the impounded waters utilized for recreational purposes in conjunction with the reservoir created.

3. IMPROVEMENTS

There were no improvements on the property given consideration in this report.

4. EVIDENCE AS TO VALUES BEFORE AND AFTER TAKING

Witnesses for the defendant testifying to timber values were Mr. Fred Bailey and Mr. James L. Morris. Mr.

Gerald Perry testified to the utilization of the property in prior years for the raising of cattle. Dr. Henry McCarl qualified as an expert in the field of geology and mineral deposits and testified in behalf of the defendant to the fact that there was a probability that 80 acres of the subject property would have value for the commercial processing of gold. Dr. McCarl made this prediction based on a one day inspection of the property and from assays performed by others during the period of 1950 to 1980. Dr. McCarl testified to the fact that an 80 acre tract of land containing .1 troy-ounce of gold per ton of mineable material would qualify for consideration for mining purposes. Dr. McCarl, under cross examination, testified to the fact that to his knowledge there were no commercial gold mining facilities as of 1978 located in Alabama but to the fact that to his knowledge there were options for leases on parcels of land for exploration purposes for the potential utilization of the mining of gold. Dr. McCarl also testified to the fact that the taking for the impoundment of the subject property would create problems in the after situation and that the permeability of the soil would create reservoirs in the mined area and make the mining of the remainder property not feasible.

It was noted by the Commission that Dr. McCarl produced no sampling maps nor did he perform assays on samples from the pits. The pits consist of various depressions over approximately 80 acres of the subject property which are grown over with woods now. The last known major digging on the property was in the late 1800's. Dr. McCarl also testified under cross examination that only approximately 1.5 acres of the 80 acres given consideration for mining purposes would be located within 50 feet of the tak-

ing for the reservoir. Also under cross examination Dr. McCarl testified that he was unaware that the run of the creek along the southwestern portion of the property was not available for water supply or mining purposes. Dr. McCarl testified to a value of the taking in the mining area based on a discounted royalty rate in the amount of $191,000.00. This gave consideration to a 20 year mining period, discounted at 15% based on gold having an average value through this mining period of $400.00 per ounce. His royalty rate was based on 5% of the market value of refined gold. No creditable evidence was given to the quantity, quality or market of the gold projected to be mined. No evidence was given as to land sold for potential gold reserves or for leases of land for the purpose of mining gold.

Mr. Robert Perry, the property owner, testified to a highest and best use for the mining of gold in conjunction with the raising of forest products in the before status. The before value testified to was in the amount of $6,633,112.00, the after value was in the amount of $3,139,975.00 with the difference being $4,494,135.00. This figure was later excluded by virtue of the fact that the property owner had ignored all or part of charges 20, 22A, 27, 28, 43, 44 and 46. Subsequent to this testimony, Mr. Perry testified to a difference composed of mineral loss $2,096,131.00, replacement of water, 3 lakes at $2,500.00, $7,500.00, two acres of land utilized in the construction of the lakes, $1,000.00, the loss of a branch, $5,000.00 and the loss of repairing rights in the amount of $743,209.00. In addition to this there was timber and fencing to be given consideration.

Mr. P. E. LaMoreaux qualified as an expert witness for the plaintiff with respect to minerals and geology. Mr. LaMoreaux testified to the fact that the permeability of the

soil surrounding the reservoir would not create problems in mining the remainder property and to the effect that no measured reserves could be made within the time frame and with the information which Dr. McCarl had spent on the property.

Extensive research including core drilling and pit sampling should be made as well as assays made of samples taken and other work would have to be performed in order to determine the measured reserves within the subject tract.

Mr. Robert Moss qualified as an expert witness for the plaintiff in valuation and testified to a before value considering a highest and best use for agricultural purposes of $245,652.00. This value consisted of $56,164.00 land value and $189,488.00 in timber value. The after value showed enhancement and was in the amount of $292,959.00. The value of the part taken was 4 acres at $400.00 per acre, 6.64 acres at $300.00 per acre and the 5.07 acres in the scenic easement at $300.00 per acre. In addition to this, his testimony was that certain roads were taken and should be compensated for in the amount of $1,200.00. The timber value furnished Mr. Moss for this appraisal within the taking was in the amount of $6,415.00, showing a total value of the taking of $12,728.00.

Mr. John White, a registered forester, testified for the plaintiff to the fact that he had made a cruise of the timber on the property in July of 1978 with a 100% cruise being made on the area taken. His estimate was that the merchantable timber, as of the date of the taking, had a total value of $6,414.00.

Mr. Benny Vinson, a registered forester, in the employment of the Alabama Power Company testified that

sales were made of timber off of various tracts and that there was no way of separating the amount of timber which was actually sold off of the Perry tract from the sales made to the purchasers. It was established that the timber on Mr. Perry's tract was probably the best quality of any timber in the whole reservoir project.

5. FINDINGS OF THE COMMISSION

After hearing the evidence submitted, examining the exhibits, asking questions of the witnesses and following the charges of law as given to the Commission by this Honorable Court, the Commission finds that there was enhancement to the remainder portion of the property after the taking. Consideration was given to Charge No. 26 in determining the value of the taking on the subject property. In addition to this the Commission through its investigation has determined that timber values as of the date of the taking were different from those testified to by the plaintiff.

Based on the information submitted the Commission and the Commission's inspection of the property and of the comparable sales the Commission finds the value of the subject property on the 14th of November, 1978, to be as follows:

Market value before the taking

185.88 Acres	$ 56,164.00
Timber	236,860.00
	$293,024.00

Market value after the taking

170.17 Acres	$109,564.00
Timber	229,243.00
	$338,808.00

Enhancement
Value of part taken

4 Acres @ $400	$ 1,600.00
6.64 Acres @ $300	1,992.00
5.07 Acres @ $300	1,521.00
Improvements — Road	1,200.00
Timber	8,019.00
Total	$14,332.00
Rounded to	$14,350.00

The Commission noted that in the testimony given by the appraiser for the plaintiff that certain funds to the extent of $1,200.00 were for replacement of roads on the remainder portion of the subject property. This testimony is contrary to testimony in other cases whereas roads lying within the taking have not been compensated for but were considered in an offset in enhancement vs. damages or either were included in the value of the tract by comparison with sales having similar routes of access through them. The Commission as instructed by Charge No. 22, Paragraph C, did not give consideration to this evidence in the making of the award but was aware of it in the testimony.

6. AWARD

The Commission awards the defendant the sum of $14,350.00 as full complete and just compensation for the

taking of a portion of Parcel No. 55 for both the land taken in fee and the imposition of the easement upon a portion of the remainder.

/s/ W. C. Lumpkin
Commissioner

/s/ Joseph B. Turner
Commissioner

/s/ O. G. Pinkston
Commissioner

APPENDIX V

(p. 1) IN THE UNITED STATES DISTRICT COURT,
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

CIVIL ACTION NO. CV 78-213-E

ALABAMA POWER COMPANY,
a corporation,

Plaintiffs,

vs.

1354.02 ACRES, ETC., et al,

Defendants.

CAPTION

THE ABOVE-STYLED CAUSE came on to be heard before the Commission, consisting of O. G. Pinkston, W. C. Lumpkin and Joe Turner; O. G. Pinkston being the Chairman of the Commission, at the Federal District Courthouse, Opelika, Alabama, on the 7th day of August, 1984, commencing at 10:00 a.m.

REPORTED BY: Judy Z. Skipper, Court Reporter

(p. 2) APPEARANCES

FOR THE PLAINTIFF:

Mr. Edward S. Allen
Attorney at Law
Balch, Bingham, Baker, Ward,
Smith, Bowman & Thagard
700 Financial Center
Birmingham, Alabama

Mr. Lewis H. Hamner
Attorney at Law
29 Main Street
Roanoke, Alabama 35274

FOR THE DEFENDANT:

Mr. Robert A. Perry, Pro Se

* * *

(p. 27) MR. CHAIRMAN: Yes.

DIRECT EXAMINATION BY MR. ALLEN:

Q Mr. Moss, in making your appraisal, did you offset enhancement to the remainder against any element of value in your opinion to the land actually taken?

A No, sir.

Q Did you—and let me have this marked as an exhibit.

(Whereupon, Plaintiff's Exhibit 1 was marked for identification.)

Q Mr. Moss, can you identify Plaintiff's Exhibit 1?

A Yes, sir. It's a summary of the facts of my appraisal of tract one oh six.

Q Is that the same summary that was provided the Commission at the time of your previous testimony?

A Yes, sir, it is.

Q All right, sir. Now, let me show this to the Commission and maybe—

MR. ALLEN: If you compare the (p. 28) figures, you all should have a copy of that same thing.

MR. PERRY: I don't know what you're looking at, but I haven't seen it, and I don't know that it's been—I don't know what it is or know what it's about or what it's got to do with this case.

The testimony is—I have given you the testimony. Now, I don't know about something later or some other time that you've given somebody, but I don't think that's got anything to do with this Court.

MR. ALLEN: Mr. Perry, at the time we had the hearing before in this and all other parcels, we had summaries of Mr. Moss' or Mr. Dean's appraisals when he did the appraisals, and they were provided to the Commission. This is—and Mr. Wright, your lawyer, was handed one as we handed them all the way around the room. This is nothing new. This was—

MR. PERRY: I don't recall seeing it.

MR. ALLEN: Well, I understand you don't recall it, but the witness has just sworn (p. 29) that's what it is, and I'm trying to explain that that's what it is.

MR. ALLEN: Have y'all got the number twelve thousand whatever dollars it is?

MR. LUMPKIN: Twelve seven thirty.

MR. ALLEN: Yes, sir. All right, sir. Mr. Perry—let's look at the value of the taking because that's—can y'all look at your last revision sheets and follow me with the value of the taking to make sure we've got the same item? Ten point six four acres in fee, thirty-five hundred ninety-two dollars; five point oh seven acres in easement, fifteen hundred and twenty-one dollars.

MR. LUMPKIN: That's it.

MR. ALLEN: Improvements, twelve hundred.

MR. LUMPKIN: Right.

MR. ALLEN: Timber, sixty-four fourteen.

MR. LUMPKIN: Right.

MR. ALLEN: Total taking, twelve thousand seven hundred twenty-eight dollars.

(p. 30) MR. LUMPKIN: Right.

Q All right. Then looking at Plaintiff's Exhibit 1, and I want to—well, as an introductory matter, Mr. Moss, did your appraisal show enhancement?

A Yes, it did.

Q That is a greater value after the taking because of the reservoir than before?

A Yes, sir.

Q Did you then proceed to separately value the remainder?

A Yes, I did.

Q Excuse me. Did you then proceed to separately value the taking?

A The taking, right.

Q And is that the twelve thousand seven hundred and twenty-eight dollars with the components that the Commission and I just related to each other?

A That's correct.

Q All right, sir. In fixing the value of that taking, in assessing the value of that taking, did you offset any enhancement to the (p. 31) remainder against the value of the taking?

A No, sir.

Q In giving your opinion of the value of the land taken, did you consider all attributes of value which in your opinion that land enjoyed?

A I considered everything about the land, yes, sir.

Q Did you consider any riparian rights that any part of that land enjoyed?

A That that one forty enjoyed?

Q Right.

A Right.

Q In the remaining part, the land line was the seven ninety and didn't go to the creek, did it?

A That's correct.

MR. ALLEN: I think that's all.

MR. PERRY: The testimony still stands on its own that there's no riparian rights included in the values that you accepted from him. And these values that you accepted from him were the exact values that you used.

* * *

(p. 59) . . . ready to start presenting maps, and I discovered that their maps do not include this land. So we have—my statement is that all of my life, I have known this piece of property to be my piece of property. And I contend that it still is.

At this time, I would like to call Mr. Ray Edwards to the stand.

MR. CHAIRMAN: Mr. Edwards, if you would have a seat in the witness chair. And you've been sworn, haven't you?

MR. EDWARDS: No.

MR. LUMPKIN: You haven't been sworn? I didn't think so.

MR. CHAIRMAN: Would you raise your hand, please.

HORRIS RAY EDWARDS,

being first duly sworn, was examined and testified as follows:

MR. CHAIRMAN: Would you state your name and address for the record, please.

A Horris Ray Edwards, 105 Pinecone . . .

* * *

(p. 72) Now,—sure. Come on up, Mr. Perry.

MR. PERRY: I don't believe we put that exhibit in, but then—

MR. TURNER: That's the one you just put in.

MR. PERRY: I thought that was the one with the two lines on it. the one you put in.

MR. ALLEN: No. I'll put it in. Do you want to mark the one with the two lines as Defendant's Exhibit 5, Mr. Perry?

MR. PERRY: Well, I thought that was the one. That was the final survey. Was that—

A Well, your deflections went with the original survey.

MR. PERRY: Oh, they did? We need this one also.

(Whereupon, Defendant's Exhibit 5 was marked for identification.)

Q Now, we've got laid out here Defendant's Exhibit 4 and Defendant's Exhibit 5, Mr. Edwards, and let me

ask you some questions. Defendants [sic] Exhibit 4, that is the survey of the seven ninety contour that you made in 1983?

(p. 73) A Right.

Q All right. And seven ninety contour runs in the north in this semicircle, if I can describe it as that, doesn't it?

A Begins right here, comes right around here.

Q Would you sort of just trail your pencil around the seven ninety contour right there?

A It would come right around—

Q Those points, I guess?

A Right, which I shot a straight line, but I put a slight curve in there.

Q And down here on this island in the circles and the little connections between that, is that the seven ninety contour you found around the island?

A It's approximate. In other words, the water would possibly curve a little bit like that.

Q The points though are correct and the lines are just approximations in between?

A That's correct.

(p. 74) Q Now, there's a straight solid line with one hundred eighty-six point seven feet written under it. That's not the seven ninety contour, is it?

A No.

Q The seven ninety contour up here in the north is this semicircle. And then in 1983, you found seven ninety contour to totally enclose that island, didn't you?

A Right.

Q And this area in between was below seven ninety, wasn't it?

A Right.

Q Now, is this the distance between the island and we'll call it the mainland, a hundred and eighty-six point seven feet?

A It is.

Q Now, you had been out there with Mr. Perry though several years earlier in 1976?

A Right.

Q Hadn't you?

A Right.

Q Which would have been what? Nearly (p. 75) seven years, give or take whatever the difference in months might be before that?

A Right.

Q Now, there, at that time, you did not survey the seven ninety contour, did you?

A I didn't.

Q And on Defendant's Exhibit 5, the circles and the solid lines are the same as on Defendant's Exhibit 4, aren't they?

A Right.

Q In other words, Defendant's Exhibit 5 is not a drawing you made in 1976?

A It's not.

Q When you were out there in 1976 though, you had seen some blazes, hadn't you?

A Right.

Q And you thought those blazes to be at approximately the seven ninety contour?

A Right.

Q Is that right?

A Right.

Q Now, those blazes, are they represented on Defendant's Exhibit 5, that is, (p. 76) your recollection of where those blazes were, by the dotted lines?

A By the dash line there is approximate.

Q In 1983, though, when you went out, didn't he survey and made Defendant's Exhibit 5, all this had been cleared?

A Right.

Q Now, did you in 19—do you recall that in 1976 there were old blazes that completely encircled this island?

A I don't remember whether they completely encircled it, but I do remember finding some blazes.

Q Did you also find blazes up here to the north in what I described a minute ago as the mainland?

A I think I remember seeing some back in there.

Q Do you remember seeing any blazes along in this one hundred and eighty-six point seven foot area that separates what now is the island from the mainland?

A I can't for a positive fact remember.

(p. 77) Q You do not remember actually seeing any blazes that would connect these two points, do you?

A No.

Q Okay. Thank you.

MR. PERRY: Ray, you do—

MR. ALLEN: Just a second. I may not be through and I may be. Let me check my coaches over here.

MR. LUMPKIN: He'll be through in a minute.

MR. ALLEN: I think that's all. Thank you.

MR. LUMPKIN: He said that's it now.

REDIRECT EXAMINATION BY MR. PERRY:

Q All right. Ray, at the time that we had looked for the—or you observed these blazes back in 1976, had the timber at that time been removed up to what should have been the bulk of the timber? Put it this way, there was only a scattering of the smaller trees left that had been taken off the land. In other words, . . .

* * *

(p. 87) . . . rather steep ground. The only way to come out with this timber was to come across this isthmus. They used bulldozers, they used timber snaking tools. They drug the timber through there. They pushed the roads. And each time they used this, they lowered this contour.

I never had any idea that this would ever come up and change the ownership of the property. I've known it

for my lifetime to be the way I've presented it. I believe it to be true. I ask you for just compensation for it.

MR. ALLEN: May we be heard on the point? I mean may we present our evidence? It will be pretty quick.

MR. CHAIRMAN: Does that conclude your evidence?

MR. PERRY: Yes.

MR. CHAIRMAN: All right. Go ahead.

(Whereupon, Plaintiff's Exhibit 2 was marked for identification.)

MR. ALLEN: May it please the Commission, we offer as evidence Plaintiff's Exhibit 2, which is the certified copy of (p. 88) Alabama Power Company's deed to this property. It's actually a deed—well, it's the deed and the deed of correction. It's dated back in 1929.

The purpose of offering it is to show that it conveyed all that part of land here and after described that would be covered, and also all that part of said lands that would be entirely surrounded by waters of the Tallapoosa River and backed up to an elevation of seven ninety feet.

MR. PERRY: In 1929.

MR. ALLEN: Right. We offer Plaintiff's Exhibit 2. We call Billy McCullough.

BILLY FRED MCCULLOUGH,

being previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALLEN:

Q Mr. McCullough, you've been sworn, haven't you?

A Yes, sir.

Q State your name for the record.

(p. 89) A Billy Fred McCullough.

Q Where do you live, Mr. McCullough?

A Dadeville, Alabama.

Q By whom are you employed?

A Alabama Power Company.

Q In what capacity?

A Title is Project Forester B.

Q How long have you been a forester?

A Well, I've been working with the company twenty-two years.

Q Have you been in Dadeville that twenty-two years?

A. Yes.

Q And in that capacity, have you worked with the company's timberlands in that general vicinity?

A Yes.

Q Does that include the land involved here; that is, that was the land that Mr. Perry and that part condemned or rather the company's lands adjacent to Mr. Perry's land?

A Yes.

Q Tell the Commission what familiarity (p. 90) you have had over the years with the company lands in the vicinity of the Perry land?

A Well, I've helped paint boundary lines twice on it I know, and I helped marked the timber sale, which I believe was in '67. And I helped on the last salvage sale we had in there before the lake was backed up, and checking it occasionally.

Q You go back to about 1962 in that area, don't you?

A Yes.

Q And you've been in Dadeville involved in overseeing the company's lands generally ever since that time, haven't you?

A Yes.

Q Continuously?

A Yes.

Q Did the company blaze and paint the seven ninety where the—you know, some part of this the company bought back years before that was subsequently developed, the Harris reservoir, didn't they, about the elevation seven ninety and a lot of places?

(p. 91) A Yes.

Q Did you in connection with your work with the company mark the seven ninety contour in this particular area?

A The first time in 1962.

Q In 1962 you helped mark those lines?

A Yes.

Q Are you familiar with the area we're talking about here where Mr. Perry contends that what is now an island was not always an island?

A I'm familiar with the area.

Q All right. In making your—in painting those lines —and you say you painted them in '62. Did you paint them at any subsequent time?

A The best I recall, it was December of '62.

Q Okay. What about later? Have you been back on the land later on too?

A Yes.

Q For what purpose?

A Well, like I said, I've had a timber sale in 1967, and I was on it then. And we make (p. 92) periodic checks on it from time to time.

Q Do you ever remember in the area where—do you know where the area is where this contention is that we're talking about in the lawsuit?

A Yes.

Q Do you ever remember a property line that had a configuration like that?

A No.

(Whereupon, Plaintiff's Exhibit 3 was marked for identification.)

MR. ALLEN: Mr. Perry, I don't have another one of these. You may need to come up and look with me.

Q. Let me show you Plaintiff's Exhibit 3 and ask you if you can identify that.

A That's a timber sale contract.

Q Is that the timber sale contract that you spoke of in 1967 or thereabouts?

A Yes, sir, this is it.

Q Now, is this contract with Bailey brothers?

A Yes, sir, Bailey Brothers Lumber (p. 93) Company.

Q Attached to that, is there a sketch or map of the area to be cut?

A Yes, sir.

Q Step up and show that to the Commission, please, sir. Can you point to the Commission the approximate location of what is now the island that we're talking about in this particular place?

A It would have been right in there.

Q In the shaded area that is marked to be cut?

A Yes, sir, right in there. Because there's the road coming down, and it would have been right in there.

Q And this—is this line that I'm dragging my finger around, is that the seven ninety?

A Yes, sir.

Q And the shaded area are the areas in which the company was selling the timber to the Bailey brothers in 1967?

A Yes, sir.

(p. 94) MR. ALLEN: We offer Plaintiff's Exhibit 3.

Q Now, Mr. McCullough, did you—you actually worked on behalf of the company in connection with this timber sale, didn't you?

A Yes.

Q What kind of equipment did the Bailey brothers have in 1967?

A Well, they subcontracted this to a gentleman by the name of Pete Bents. And he had a truck with a side loader and some mules and a small crawler type tractor I believe is what he had logging it.

Q This agreement, was it brought—was it entered into, drawn up in advance of the sale?

A Yes, sir—no, the timber was sold and then this was the contract after, you know, which the timber was sold before they started any cutting.

Q That would be before there was any cutting?

A. Yes, sir.

MR. ALLEN: That's all.

* * *

(p. 101) Q Mr. McCullough, go ahead and give your explanation you offered to give as to why you feel that there was no configuration like that that I've drawn up there?

A About me painting this line?

Q Yes, sir.

A Well, in 1962 was the year I went to work for the company, and I didn't have any annual leave. And I

helped Mr. Curtis Griffin during the week of Christmas, which nearly everybody was off but me.

And he put me to painting this contour line around there, along that contour line at seven ninety. And that's the reason I remember it. That's the second line I helped paint in that area at that time, and that's the reason why I said I remembered it.

Q Do you think you would have remembered if you had had to paint something that was a hundred and eighty feet or so, some kind of a narrow corridor like this configuration I've drawn?

A I believe I would. I don't remember (p. 102) it at that time, and I don't remember it the last time that I've painted it. I don't remember it either time, and I've helped paint it twice.

Q And you remember no such configuration as this?

A No, sir, I sure don't.

Q Now, if—who did you say the cutter was?

A Mr. Pete Bents.

Q Well, if Mr. Bents cut below the seven ninety, cut everything below the red line and the island, and it was an island—

A He didn't cut everything. It was a select cut. We marked the timber. We cut over the whole area.

Q If he followed the red line, dropped down below the red line and there was an island, he may have missed the island?

A Possibly.

MR. ALLEN: Okay. That's all.

* * *

(p. 216) MR. CHAIRMAN: Go ahead, Mr. Allen.

BOB MOSS, being previously duly sworn, was examined and testified further as follows:

REDIRECT EXAMINATION BY MR. ALLEN:

Q Mr. Moss, you appraised this property for the power company, didn't you?

A Yes, I did.

Q In connection with this condemnation proceeding?

A Yes, I did.

Q Now, originally, the power company incorrectly took the position in the southeastern portion of this property that its line was to elevation seven ninety rather than Wedowee Creek?

A Thats [sic] correct.

Q Did Mr. Perrys [sic] disagreement with the company about that come to your attention?

A Yes, it did.

Q At what point in time, approximately, (p. 217) did it come to your attention?

A It came to my attention in 1976, September. On September the 1st, 1976, I met Mr. Robert Perry in the back of his grocery store in his office. And he told me that his father had disputed Alabama Power Company's claim to land below the seven ninety some years ago. And

we, meaning Alabama Power Company, this is a note to myself, had not experienced any claims of—had not exercised any claims of ownership. But they had. They, meaning the Perrys, had.

And I put a note here that s [sic] the northeast to the northeast of thirty-three, nineteen and eleven. The survey map shows Alabama Power Company's ownership below the seven ninety.

Q All right, sir. Now, what, if anything, was done by the company thereafter about resolving this dispute?

A Well, I called it—I put this same note on my first appraisal I made. And this apparently called it to the attention of the (p. 218) people doing the title work. And eventually, they, along with other work they had to do, they did resolve it in the summer of '78.

Q All right. Lewis Hamner was doing the title work, wasn't he?

A Yes, sir.

Q When was it absolutely finally confirmed to the company from Mr. Hamner that the property line in that quarter quarter section was Wedowee Creek?

A Best I recall, it was—well, it was in the summer of '78. Now, just exactly whether—I think there was a letter in the file, I don't have it, showing around June, I think, of '78. But that would have been simply the written record.

Q All right. Did that come to your attention almost immediately?

A Yes, sir, right.

Q John White's cruise, I think it has been testified, was in July, July 25th and 26th. That's in the record, and I'm recalling that from memory. Did you know prior to John White s [sic] (p. 219) cruise that the property line in that forty was Wedowee Creek rather than seven ninety?

A Yes, sir.

Q Were you working with John White on a daily basis during that period of time getting these appraisals and cruises done?

A Almost daily.

Q What was going on in July—June, July and thereafter of 1978 with respect to these cases?

A We were trying to get them updated and get final appraisals made and get the appraisals updated so that final offers could be made, and we could pay into court the correct amount of money, the amount of money that we thought was due the property.

Q Do you recall the complaint in the southeasterly portion of the reservoir was filed in July of '78 and the complaint in this and the northeastern portion was actually filed in November of '78?

A Correct.

Q Were you in and around Wedowee a lot (p. 220) during this period of time?

A Yes, sir. I was there a good bit of the time. I would say probably about sixty, seventy percent of my time was spent there.

Q Were you communicating back and forth with John White about his timber appraisals?

A Yes, sir.

Q Were there updates and revisions and such being required on a number of parcels during this time?

A Yes, sir.

Q Now, when did the survey map actually get revised in the office by the draftsman to correct on the survey map the line from seven ninety to Wedowee Creek?

A It was August the 10th, 1978.

Q That's when the survey drawing itself got corrected. However, you knew that prior to that time?

A Yes, sir.

Q And is it your testimony that you knew that prior to the time John White went on the property and made this timber cruise?

(p. 221) A Yes, sir.

Q Did you accompany John White to show him where to make various cruises during this period of time?

A Yes, sir. Not every tract he appraised, but many of them I did.

Q Do you know whether or not you did on this particular piece?

A Yes, sir.

Q Did you?

A Yes, sir.

Q Now, in the time you accompanied him and showed him what to cruise, you knew that the line went to Wedowee Creek?

A Right.

Q In your judgment, did you tell him to cruise to Wedowee Creek at that time?

A I'm sure that was the purpose of our going out there was to cruise everything that belonged to Mr. Perry. And we would have cruised to Wedowee Creek in that northeast of the northeast.

Q And that time, you knew where the (p. 222) line was?

A At that time, I knew it, yes, sir.

Q Did you, as a matter of course, send John White revised survey drawings every time one of them came out?

A Right. Every time I received one, I usually got several copies, and I sent one to John.

Q So that if any revision was necessary in his appraisal, he would make it?

A Correct.

Q Was any revision in this appraisal ever required even after you sent John White revised survey maps?

A Well, only when we added the eight hundred—no, we cruised the whole thing. He cruised the whole thing at that one time. The only revision was in the values. There was revisions—

Q I'm talking about in the volumes, not the values.

A No.

Q Now, in fact, there were two (p. 223) revisions to the survey map. And he was sent two revised maps after July of '78, wasn't he? Look in the bottom of the map.

A Well, the one on August the 10th and then the one on August the 31st.

Q So August 10th is a revision?

A Right.

Q Changed the property line in the southeast portion of the tract from seven ninety to Wedowee Creek?

A Correct.

Q Was he provided that drawing very shortly after August 10th?

A Yes, sir, he was.

Q All right, sir. And then he was provided very shortly after August 31st another one, which, of course, also showed the property line as Wedowee Creek; is that correct?

A Right.

Q Now, he could not, of course, have had the map with him on July, this survey map, with him on July 25th and 26, could he?

A No, sir.

(p. 224) Q But you knew it, and you went with him; is that your testimony?

A Right.

Q And showed him what to cruise?

A Right.

Q Now, Mr. Moss, did you before testifying, let s [sic] say prior to testifying before this Commission back in 1981, had you revised your appraisal to also appraise the

land laying between seven ninety and Wedowee Creek? Or rather, let's say, to consider the property as shown in the final revised maps?

A Yes, sir.

Q Did you go on the property prior to that time?

A Several times.

Q Did you go on that portion of the property between seven ninety and Wedowee Creek, in that part of the property?

A Yes, sir.

Q And did you consider in making your appraisal the attributes of that as well as all the other parts of the property?

(p. 225) A Yes, sir. The attributes of that piece of property in question?

Q Yes, sir.

A Right. Yes, sir.

Q Now, your appraisal of the taking was fifteen point seven one acres, wasn't it?

A That s [sic] correct.

Q And according to the survey maps, is that the total taking including the area between seven ninety and Wedowee Creek in the southeastern portion of the property?

A Yes, sir.

Q Now, that, of course, does not include the area we have been disputing earlier in this hearing about whether or not there was a [sic] isthmus or whether there was an island?

A Right. It does not include that.

Q But it does include this area where the power company up until June of '78 was incorrect in its belief as to the property line?

A That's correct.

Q Mr. Moss, let me—this is by way of information for the Commission. I want to (p. 226) recall something from the earlier testimony, which I assume is okay since my opponent has been permitted to do that. There was one other appraisal made—excuse me. One other cruise made of a portion of this property. You may recall it was made by Mr. Morris who was—he was Mr. Perry's witness.

And Mr. Morris made a cruise of the area between elevation seven ninety-three and elevation eight hundred, which was the area that was not cleared by the power company. And Mr. Morris testified that he cruised seven point four acres, and he made an appraisal of the standing timber on that seven point four acres of thirty-four hundred forty-eight dollars and thirty-three cents. That is four hundred and sixty-five dollars and ninety-five cents per acre of timber in between elevation seven ninety-three and eight hundred.

And I just want to remind the Commission of that as a prelude to what I want to show you next.

Mr. Moss, you have been on this (p. 227) property a number of times, haven't you?

A Yes, sir.

Q And you've said that you've been on—well, have you been on all parts of the taking?

A I have.

Q Both the parts. On the westerly side where there's been no dispute about the—except the island thing, and have you also been on the part between seven ninety and Wedowee Creek in this one forty?

A Where I could, a good part of it, yes, sir. Most of it.

Q Was the timber in the area between seven ninety and Wedowee Creek in that disputed area typical of the timber on the taking as a whole?

A Not in my opinion.

Q Was it better or was it worse?

A It was worse.

Q Let me show you this exhibit.

(Whereupon, Plaintiff's Exhibits 4-6 were marked for identification.)

Q Mr. Moss, let me ask you to identify (p. 228) first Plaintiff's Exhibit 4. 4 being the aerial photograph only.

A Yes, sir. That's an ASCS map to the one sixty scale.

Q Is that one that's previously been introduced into evidence in the same case?

A Yes, sir.

MR. ALLEN: We offer Plaintiff's Exhibit 4.

Q All right, sir. What is the date of that particular aerial photograph?

A January 1973.

Q So it predates—

A Excuse me, February.

Q '73?

A '73.

Q So it predates the taking here?

A Correct.

Q Okay. Let me show you Plaintiff's Exhibit 5 and ask you what that—can you identify what that overlay portrays?

A It portrays the tract one oh six, Mr. Robert Perry's tract. And there has been drawn (p. 229) in on there the seven ninety contour and the eight hundred foot contour.

Q From these survey maps?

A From these survey maps, correct.

Q Do these lines on this overlay, Defendant's Exhibit 5, fairly portray the locations of those elevations as shown on the survey maps?

A Yes, sir.

Q Let's go up here to the Commission. Now, Mr. Moss, is where I'm pointing out with my pen; that is, between the dotted line and Wedowee Creek, is that the space in contention between elevation seven ninety and Wedowee Creek?

A I believe it is, yes.

Q The dotted line, the seven ninety. Wedowee Creek is down at the bottom, the solid line?

A That's right.

Q Then eight hundred is on above the dotted line; is that right?

A That's right.

Q In this space in between the Wedowee (p. 230) Creek and the seven ninety in this one forty, could you point out to the Commission the difference as you describe in the quality of the timber there as compared to the rest of the taking?

A Well, the rest of the taking—excuse me. The rest of the taking being up in here. This is where the good stands of timber were. And, of course, back up in here too. But down in here, this is very steep. This is steep. You asked how it had been on all that between the seven ninety and eight hundred. Sometimes I had to climb above it to get around some bluffy areas in there.

Q Was this entire area right here a bluff?

A Right. This is—it starts out—of course, you can walk it fairly well by hanging on. But as it gets on around in here, it gets very, very steep.

Q What is this area over here?

A This is a little pasture, cleared area. Had been used as pasture.

(p. 231) Q Now, let me ask you what Plaintiff's Exhibit 6 is, that overlay.

A This shows the seven ninety-three showing—well, we bought from the seven ninety—in this case seven ninety to the eight hundred. It shows how close the seven ninety-

three and the seven—it's the seven ninety-three and seven ninety.

Q Would the area between this blue line, seven ninety-three and the solid eight hundred line on the other one, is that the area Mr. Morris cruised?

A Between seven ninety-three and the eight hundred, right.

Q Okay. Now, does this kind of help show that bluff?

A Right. It shows how closely, if you're looking down on it, how closely the seven ninety-three is to the eight hundred.

MR. ALLEN: Now, we offer Plaintiff's Exhibits 5 and 6.

MR. CHAIRMAN: Let me clarify something in my mind while everything is up here. (p. 232) In my notes, I have James L. Morris, a hundred percent cruise on July—of June on seven point four acres between seven ninety-three and eight hundred. And we had the pine and pine pulpwood and hardwood and hardwood pulp. And that is the area between the blue and the black on this entire tract there; is that correct?

THE WITNESS: That's right, yes, sir.

Q Now, Mr. Moss, John White's appraisal of timber was furnished to you, wasn't it?

A That's correct.

Q Did you—when you revised your appraisal on this, did you formally do the paperwork on revising your appraisal on this property after—

A After receiving the maps.

Q Yes. After receiving the maps, after receiving the information that you were supposed to go to the creek?

A Let's see. That would have been September 31st. 1978.

Q Okay. September of '78 is when you went through and reworked all your figures; is (p. 233) that correct?

A Well, no. I revised again.

Q Okay.

A There was another revision.

Q Well, was that first revision, though, one that you did which accommodated the change in property line from seven ninety to Wedowee Creek?

A Correct.

Q And you used—did you use John White's figures that he had given you as a result of y'all going out there on July 25th and 26th?

A That's correct, yes, sir.

Q All right. Now, let me ask you what his final figures were. Of course, they're already in evidence. The evaluation of timber in the taking—

MR. ALLEN: You gentlemen may have it. I've got sixty-four hundred fourteen dollars and fifty-seven cents, if that agrees.

A Oh, okay. I thought you were wanting—

(p. 234) MR. LUMPKIN: Sixty-four fifteen?

THE WITNESS: Sixty-four hundred and fourteen dollars and fifty-seven cents.

Q Sixty-four fourteen fifty-seven?

A Correct.

Q All right. If that appraisal had been based upon fifteen point seven one acres in the taking, mathematically how many dollars per acre would that be?

A If it had been predicated on nine point seven nine acres?

Q No. If it had been predicated on fifteen point seven one, what would that be?

A Four hundred and eight dollars and thirty-one cents. Four oh eight thirty-one.

Q Four oh eight—

A Thirty-one.

Q —thirty-one. Now, if it had been predicated on nine point—well, you're going to have to tell me how much was added so—

A Nine point seven nine acres.

Q Well, they're saying nine point six, so you may have to re—

(p. 281) MR. ALLEN: I'm not asking this Commission to do anything. I'm just stating that if they try to be put up, that objection, I believe, is available to me. And I intend to make it.

MR. PERRY: Mr. Moss, I believe that concludes what I have to ask you.

REDIRECT EXAMINATION BY MR. ALLEN:

Q Mr. Moss, you didn't cruise this area, did you?

A No, sir.

Q What did you do? Show John White what to cruise?

A Right.

Q Okay. And at that time, it's your testimony that you knew the line was Wedowee Creek; is that correct?

A That's correct, in that one quarter quarter section.

Q All right, sir. And, let's see. That was within two weeks of actually having the survey map itself redrawn, wasn't it?

(p. 282) A That's correct.

Q Was there time lag before knowing that a change needed to be made or actually making one on the survey maps at this time?

A Yes, sir.

Q Okay. Was there a lot of—

A Working on a lot of surveys up and down the rivers, two rivers.

MR. ALLEN: Okay. Thank you. That's all.

(Witness is excused.)

MR. ALLEN: Mr. White, you've been sworn, haven't you?

MR. WHITE: Right.

JOHN B. WHITE, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALLEN:

Q State your name for the record.

A John B. White.

Q Did you do the timber cruise for the (p. 283) power company on the Perry property?

A I did.

Q Now, Mr. White, are you generally familiar with this dispute about whether the cruise was made in between elevation seven ninety and Wedowee Creek in this one forty acre point of Mr. Perry's property?

A Right.

Q Do you know what the area is that's in dispute? You understand what the dispute is?

A Right.

Q And all that. When did you make your cruise?

A July 25th and 26th of 1978.

Q Now, can you tell the Commission at this date exactly what you did and did not cruise on that particular property from specific memory?

A No.

Q From your map that you have with you, let me ask you what this—

A This is a survey map.

Q Did you use that map in connection (p. 284) with your timber cruising for the power company during this time?

A Right. Normally when I got plats from either Baker Dean or from the power company directly, like by mail, I always plotted the tracts on this map where I could find them.

Q All right. If you did not plot the tracts on that map, how did you find them?

A I would say someone had to take me there.

Q Who was the someone who took you to pieces of property that you did not plot like that and find for yourself?

A With the power company?

Q Yes.

A Mr. Moss.

Q Bob Moss?

A Right.

Q Do you have drawn off on there the Perry property?

A No, I don't.

Q Is that an indication to you that Bob Moss took you to this piece of property in (p. 285) connection with your cruise on July 25th and 26th, 1978?

A I could never have found it without him.

Q All right. Now, this property is also actually on two maps, isn't it?

A Right.

Q Doesn't it overlap two quadrangles?

A Wedowee and Ophelia.

Q Do you have the property drawn off indicating that you did it yourself on either of those maps?

A No.

Q Is it then your judgment that Bob Moss took you to this property when it was cruised in July 25 and 26, 1978?

A Right.

Q Mr. White, during this period of time, the period of time I'm talking about is the summer, let's say, of 1978, June, July, August, September, were you doing a lot of cruising for the power company in connection with updating these appraisals to get these condemnations (p. 286) filed and proceeded with?

A Right. We were working on it everyday.

Q Were you in daily contact with Bob Moss?

A And Baker Dean.

Q About what you were doing?

A Right.

Q Bob Moss was doing—appraising some of the tracks and Baker Dean was appraising others?

A Right.

Q Now, were you sent map revisions as they came out of the company's survey department on a regular basis?

A Hundreds of them.

Q When you received each map revision, what did you do?

A Well, if it was a revision that called for additional timber cruising, I went and cruised the timber.

Q And was this a regular thing that when maps were revised, you were sent the (p. 287) revised maps and then you reviewed them to see if they called for additional cruising other than that which you had done before?

A Right.

Q Did you complete your cruise on July 25 and 26, 1978?

A Right.

Q So that if you were sent these subsequent maps, as Mr. Moss has testified, and if you reviewed them, as you have testified, what would be the occasion for not doing additional cruising?

A Only thing, the only conclusion I could reach, is I must have done it already.

Q On July 25 and 26, 1978?

A Right.

Q Is the timber in this disputed area or was the timber in this disputed area—and I want you to base your opinion on this either on this map or on whatever recollection you might have or on our visit to the property here a couple of weeks ago. Was that timber in this disputed area as good as the average timber in (p. 288) the taking on this property?

A No. The best timber was up in this area right here.

Q Which is up in the western part of the property?

A Right.

Q What is there different about the disputed area between Wedowee Creek and the seven ninety elevation that makes that timber not as good?

A Well, the difference would be, the main thing, timber in this area up here is more available. I'm talking about the taking area now, and it was tremendous standing timber there.

Q Again, you're referring to the timber at the western end of the place?

A Right, and the timber on the southeast. That's a fairly steep slope facing south. It would be kind of a draughty piece of wasteland, plus—which a lot of it was real steep, plus which some of it was open.

Q Some of it, of course, as you can see on this map, is open?

* * *